



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

Appeal Number: PA/12635/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC

On 31st October 2018

Decision & Reasons

Promulgated

On 29th November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[A O]

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik (Counsel)

For the Respondent: Mr C Bates (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge A R Hudson, promulgated on 3rd July 2018, following a hearing at Manchester on 21st June 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Nigeria, a female, and was born on 19th February 1981. She appealed against a decision of the Respondent dated 15th November 2017 refusing her claim for asylum and humanitarian protection pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The basis of the Appellant's claim is that she has been a victim of sexual abuse and assault. As a claim, this was accepted. However, the basis upon which the claim has been raised, has been rejected in its various aspects. As the refusal letter makes clear, the Appellant had a previous appeal, where she claimed to have been sexually abused by her husband and needed to bring her child to the UK to protect him from terrorists (see Annex C). She did not mention in the appeal that it was due to either the Nigerian police force, or that it involved her kidnapping in Nigeria, both of which claims were now raised before the Secretary of State, to be addressed in the decision letter of 15th November 2017. Nevertheless, as the refusal letter makes clear, because the Appellant had provided medical documentation to support her claim "of gynaecological trauma" it was therefore accepted that she had been a victim of sexual assault (paragraph 47 of the refusal letter). In short, therefore, the refusal letter concluded that the Appellant had been a victim of sexual assault. On the other hand, it was not accepted that she had been sexually assaulted by the Nigerian police, or had been captured by a group of men when fleeing her area of origin, namely, Modakeke, or that she had been raped by her mother's neighbours in 2016, as she claimed to now be the case (paragraph 55).

The Hearing

4. At the hearing before Judge A R Hudson, there was evidence to the effect that the Appellant was a vulnerable witness who was not in a position to give evidence. The judge at the outset addressed this matter under the heading "Introduction" and made it clear to the Appellant's representative, Ms Mottershaw, that whilst it was the Appellant's prerogative not to give evidence, "it would not lead to any inferences against her" although given "the weight of the evidence within the bundles" which could not be tested in cross-examination, there may be "gaps in the evidence" which could "not be explained in oral testimony". The Appellant "understood this but did not wish to give evidence" (paragraph 8).
5. The judge went on to consider the evidence before her, in a determination that was detailed and comprehensive, and concluded that the Appellant could not succeed in the appeal, because her claim could not be substantiated to the requisite level of proof in an asylum appeal, and that in any event, she came from the capital city of Osun State, in her region, where she had visited last in 2014 and 2016 and stayed with her mother and her son. Indeed, "the whole family is said to live in Modakeke" and

the Appellant “will find internal relocation in that area, or elsewhere in Nigeria”. She was clear that the Appellant

“would have a number of locations open to her. Her family are local to Modakeke but nothing about any person complained of suggests that anyone would have the power or the desire to track her elsewhere in the country” (paragraph 27).

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the judge had fundamentally flouted the Rules of fair procedure in an asylum claim. This is because the judge had failed to heed the requirements in **AM (Afghanistan) [2017] EWCA Civ 1123**, in that she had failed to explore other avenues in the context of which the Appellant’s evidence could be assessed, given that it was the extra opinion that she should not give oral evidence, but which did not obviate the need for there to still be a fair hearing. The grounds state that the judge had simply proceeded “to treat the consequences as being adverse to his credibility” of the Appellant not giving evidence, whereas “the proper question had to be where there is such medical evidence how can the Appellant be accommodated so that a fair hearing can take place” (paragraph 8).
8. Second, it was stated that the judge had wrongly come to the conclusion that the Appellant’s evidence was implausible (see paragraphs 22 to 23), because, in circumstances where the Appellant had not given evidence and had not been cross-examined, issues in relation to matters such as the photographs which the Appellant presented to her mother in Nigeria in 2016, could not be addressed by way of evidence from her, and yet the judge took the conclusion that her evidence was one that could not be treated as reliable (see paragraph 11 of the grounds).
9. Permission to appeal was granted on 7th August 2018.

Submissions

10. At the hearing before me on 31st October 2018, Mr Karnik, appearing on behalf of the Appellant proceeded to make good the grant of application upon which permission had been granted. He made the following submissions.
11. First, the strictures of **AM (Afghanistan)** had not been followed so as to ensure that the Appellant was a beneficiary of a fair hearing.
12. Second, given that the medical evidence was that the Appellant was a “vulnerable witness”, the Joint Presidential Guidance in relation to vulnerable witnesses had not been properly applied. On the contrary, the judge had held the Appellant to a higher standard of proof simply because he had failed to give evidence. This was clear from her analysis at

paragraph 22, where the judge deals with the Appellant's complaint of having been raped by a group of men in 2016 who had targeted her due to her marriage to a white man, but where the judge proceeded to dismiss the entirety of the claim as it was put by the Appellant.

13. Third, the Secretary of State had accepted that the Appellant was a victim of sexual violence, and this had to be the backdrop against which the Appellant's situation had to be ultimately evaluated.
14. Fourth, the judge accepted that the Appellant had been subjected to extreme violence.
15. Fifth, at A10 of the bundle there was expert evidence from a psychiatrist and at A11 it was confirmed that the Appellant had PTSD and anxiety and had "chronic levels of anxiety". The medical evidence states that her condition is such that it would "place her at a high risk of suicide".
16. Sixth, it was in these circumstances that the Appellant's fitness to give evidence had to be assessed, and yet this was not what had happened in this case. The judge had taken the view that the Appellant had the ability to give instructions to her legal representatives. However, giving instructions was not the same as being able to give evidence and to be subjected to cross-examination. The expert was clear that the Appellant should not give evidence. The judge failed to grapple with the distinction between giving instructions and giving evidence in court.
17. Seventh, at A62 there was the Joint Presidential Guidance in relation to one of the witnesses. The bottom page of this makes it clear that some people are vulnerable simply on account of what has happened to them, and the Appellant plainly fell into such a category.
18. Eighth, all in all, therefore one had to look at the way in which the judge had approached the issue of the Appellant's vulnerability. One had to start with what the judge said at paragraph 15, where she made it clear that she had seen a letter dated 13th June 2018 asserting that the Appellant "has been identified as vulnerable" and therefore would not be giving evidence. The judge then referred to the Joint Presidential Guidance Note of 2010. It was observed that the Appellant was 18 and receiving a form of healthcare. Reference was made to Section 59 of Safeguarding Vulnerable Groups Act 2006. However, the judge then went on to say that, "having ascertained that she understood the limitations in her case were the Respondent unable to cross-examine her, I do not consider that it is necessary to require her to give evidence" (paragraph 15). Mr Karnik submitted that the reference to there being a recognition by the Appellant of the "limitations in her case" if she were not to be subjected to cross-examination, was effectively to penalise her for her not being able to give evidence. The judge could not simply rule that it was not necessary for her to give evidence. Other avenues had to be explored.

19. In the same way, at paragraph 25 of the determination, the judge goes on to say that she accepts what had happened to the Appellant in 2000, which addresses her sexual assault by the Nigerian police, and the judge observes that the Appellant for that reason “may have an inherent distrust of those in authority”.
20. However, she then goes on to say that the Appellant
“subsequently spent a decade working in medical facilities where she would undoubtedly have had dealings with public bodies. Her evidence was that she worked for the government as a nurse. That is likely to have simply assisted any inherent mistrust” (paragraph 25).
21. The judge had observed that the Appellant’s witness statement recorded that “any contact with men frightens me” (see witness statement of March 2017) and that she had also added that, “I can barely go out and I am terrified in the presence of men”. However, the judge was wrong in the light of this, to then go on to say that “I do not accept Mrs O’s assertions of the level of her vulnerability” (paragraph 25). It was almost as if the Appellant was being disadvantaged by her failure to have given evidence before the judge. Mr Karnik ended with the observation that there had been no Rule 24 response in this case, and it was plain that there had been an error of law.
22. For his part, Mr Bates submitted that the first question was why the Appellant was claiming asylum in the first place. First, the judge addresses this at paragraph 21. She observes that the incidents that the Appellant recounted “will have undoubtedly had a profound effect upon her” but that she was able to live and work in Nigeria as both are married and a single woman, without persecution” (paragraph 21). She went on to say that the humanitarian situation in Nigeria had not changed over almost twenty years since the instance described had taken place.
23. Second, the judge indeed, goes on to say that
“in the immediate aftermath of the 2000 violence, Mrs O and her family returned to Modakeke without further incident. Having left Nigeria in 2011 Ms O felt able to return to Nigeria - and specifically Modakeke - for holidays on two occasions since then. Ms O accepted that those instances were related to a crisis in Modakeke and that once that crisis ended the region was at peace (AIR question 276 to 278). I therefore find that neither incident formed the basis of a claim for asylum or humanitarian protection” (paragraph 21).

The judge then went on to consider the 2016 incident and rejected it outright as not being credible. The judge was entitled to come to that conclusion.

24. Third, if it is now being suggested that there is a misdirection in the way that the judge treated the Appellant’s inability to give evidence at the hearing, it is necessary to ask how differently the judge could have approached the matter. It was the Appellant’s wish not to give evidence.

It was the extra medical evidence that she should not give evidence. The Appellant did not give evidence. She was not forced to do so. She was given the requisite breaks that she needed in confirming her witness statement and correcting it. The judge then considered the whole of the evidence. She did not resile from saying that the Appellant had not been a victim of sexual violence. The judge accepted that she had.

25. However, the judge then went on to reject other aspects of the claim, and concluded that she was not credible in these other respects. For example, in her screening interview the Appellant had said that she took walks at night and was raped (at question 4.1). The implication of this, noted the judge, was that she was raped during these walks. However, given the dangers of a woman walking alone in Nigeria in any circumstances I find it unlikely that she would have put herself in that position” (paragraph 23).
26. Mr Bates submitted that even if the Appellant had given the same evidence orally, the judge was entitled to come to the conclusion that this evidence was simply not credible of a woman walking late at night and being easy prey to a rape assault. In the same way, the Appellant had given evidence that her son was not beaten but the affidavit then goes on to say that he was. The judge was entitled to draw the inference from this that, “I would expect her to remember that her son had been beaten if she believed that he had been” (paragraph 24). This conclusion was equally open to the judge.
27. Finally, even if the Appellant was believed comprehensively, the fact remained that the Appellant had the availability of internal relocation to Nigeria as a backstop. The judge made it clear (at paragraph 27) that the Appellant came from the capital city of Osun State, which was not a rural location, and that the Appellant had been educated there and had spent time, there, and had family there. Moreover, “Nigeria is a very large country and there are many areas where Ms O could establish herself” (paragraph 21). But most importantly, “her family are local to Modakeke but nothing about any person complained or suggest that anyone would have the power or the desire to track her elsewhere in the country” (paragraph 27). The judge was entitled to dismiss the claim.
28. In reply, Mr Karnik submitted that the reference to internal relocation being available, by the judge (at paragraph 27), was inadequate because it does not address the issue of safety of relocation. I am bound to say that I disagree with this, because the judge in terms makes it clear that there is nothing in the evidence about any person complained of that suggests that “anyone would have the power or the desire to track her elsewhere in the country”. Second, Mr Karnik submitted that it was important to explore other methods by which the Appellant could give evidence, or that her evidence could be taken, and the failure of the judge to do so, with the cautionary note added, that her evidence could have gaps and could have limitations, was indicative of there being a failure of a fair hearing.

No Error of Law

29. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
30. First, in what is a careful and sensitive determination, the judge had a situation before her, where the Appellant herself was unwilling to give evidence. This is clear from the determination that, on the day of the hearing, “it is not suggested before me that she [the Appellant] should not give evidence because she would be unable to give good or reliable evidence, but because it would cause her distress” (paragraph 16). When I asked Mr Karnik whether this was indeed the case, he, being the adept and a seasoned practitioner in this Tribunal that he is, helpfully made it clear that he did not represent the Appellant at the hearing below, and he could say neither way, what was indeed the case.
31. But in any event, it was also the case before Judge Hudson that the expert evidence was that the Appellant should not give evidence because this would be damaging to her. The judge expressly addressed this as well making it clear that the letter dated 13th June 2018 had asserted that the Appellant “has been identified as vulnerable”, and that “therefore would not be giving evidence”. The judge in terms set out “the Joint Presidential Guidance Note of 2010 and Section 59 of the Safeguarding Vulnerable Groups Act 2006”. There is then the issue as to whether the judge had used language that was inadvertently such as to penalise, or to be seen to be penalising, the Appellant for not giving evidence. Nothing could be further from the truth.
32. The language that was carefully used by the judge was that “having ascertained that she understood the limitations in her case were the Respondent unable to cross-examine her, I do not consider that it is necessary to require her to give evidence”. The reference here is to “limitations”, and this must plainly be right as a purely factual aspect of the appeal, where a party to the proceedings chooses not to give evidence, and chooses not to be orally cross-examined on it. There is, however, nothing whatsoever that suggests that the judge took an unnecessarily unsympathetic view to the Appellant, purely on account of her not being able to give evidence orally.
33. Second, this is manifestly shown by the fact that the judge then immediately goes on to say that she has read the transcript of the asylum interview and that it was clear that the Appellant “was more than capable of coping with questioning from the interviewing officer”. The judge goes on to say that, she appears to have acquitted herself well and given comprehensive answers to the questions asked. She brought a wealth of documentation, explained all of it, and corrected previous recorded errors”. The judge goes on to say that the Appellant did become upset

when speaking about the 2000 sexual exploitation, but that, “she asked for a break, had one, and was able to continue thereafter”.

34. The sensitivity of the judge to the Appellant’s predicament is also clear from the reference to how

“when recounting the most traumatic incident – the detention for five days – she insisted on completing her account when the interviewer would have moved on. There is no indication within the transcript that she was inhibited in her responses” (paragraph 17).

It is in this context that the judge then concluded, as it was open to her to conclude, that the Appellant “is not in any way cognitively impaired and is clearly competent” (paragraph 18).

35. Third, the judge does not discount the incidents that have taken place. It would have been otherwise had she done so. The refusal letter recognises that the Appellant had been a victim of sexual violence. The judge used that as a starting point. She makes it clear that “these incidents will have undoubtedly had a profound effect upon her”, but then goes on to say that “she was able to live and work in Nigeria as both are married and a single woman, without persecution” (paragraph 21).
36. Finally, it is salutary to remember the basic jurisprudence in relation to expert reports. It is well established that experts do not decide cases. Judges do. The expert’s function is to advise the judge. The judge is fully entitled to accept or reject expert opinion. If the judge decides to reject an expert’s advice, he or she, must then have a sound basis upon which to do so, and must then explain why the advice has been rejected: see **M-W (a child), Re [2010] EWCA Civ 12**, per Wall LJ (at paragraph 39). There is nothing in the determination, which suggests that the judge did not heed these strictures.
37. Accordingly, notwithstanding Mr Karnik’s valiant and commendable efforts to persuade me otherwise on behalf of his client, I have to conclude that there is no error of law in this determination. The judge was entitled to proceed in the manner that she did. The decision stands.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law such that it falls to be set aside.

The appeal is dismissed.

An anonymity direction is made.

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

Deputy Upper Tribunal Judge Juss

23rd November 2018