



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

Appeal Number: AA/10398/2015

THE IMMIGRATION ACTS

Heard at Field House

On 10 January 2019

Decision & Reasons

Promulgated

On 30 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MS RMC

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Pipi, Direct Access

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, born on 24 November 1954, is a citizen of Kenya who appealed to the First-tier Tribunal against the decision of the respondent dated 10 July 2015 to refuse the appellant's protection claim (the appellant's previous appeal having been refused by the First-tier Tribunal and then her subsequent appeal to the Upper Tribunal being successful and the appeal remitted to the First-tier Tribunal, following the Upper Tribunal decision dated 5 December 2016 quashing the decision).

Although the appellant applied to the Court of Appeal for permission to preserve part of the findings that permission was ultimately refused. In a decision, promulgated on 8 November 2018, Judge of the First-tier Tribunal E B Grant dismissed the appellant's appeal on all grounds.

2. The appellant appealed to the Upper Tribunal on the grounds that the judge misdirected herself in:
 - (1) Failing to state the standard of proof;
 - (2) Failing to apply the UN Handbook in assessing the appellant's evidence;
 - (3) Failing to make findings on whether or not she accepted the appellant's explanations, in relation to alleged inconsistencies, put forward by the appellant;
 - (4) Misdirecting herself in relation to part of the chronology, as it was the appellant's evidence that it was only in 2004, when the appellant's second escape failed, that she was held captive; and
 - (5) Failing to make a substantive decision regarding private life in the context of mental illness; and
 - (6) Failing to take into account stigma and discrimination by the wider society in relation to mental health in Kenya; and
 - (7) Erring in the approach to Article 8 including stating that the appellant could not succeed under Article 8 prior to considering proportionality.

Error of Law

3. It was conceded by Mr Jarvis at the outset of the appeal that the decision of the First-tier Tribunal could not stand, and in particular that the judge had materially erred in her approach to the appellant's asylum claim. It was accepted that the judge erred in relation to her understanding of the appellant's chronology and when she had or had not been detained, which ultimately led to the conclusions at [29]. Mr Jarvis accepted that the findings were additionally materially flawed in respect of the judge's findings that the appellant had undergone FGM in Kenya as a young adult ([19] and [21] of the decision and reasons) whereas it was the appellant's claim that this had occurred when she was 46 years old.
4. This material mistake of fact, it was conceded by Mr Jarvis, led the judge into further error in her findings at [25] in making adverse credibility findings that the appellant made no mention of her fear of the Mungiki until June 2015, despite claiming asylum using a false identity in December 1999, it being the judge's finding that "she had already suffered FGM" "during all these periods of time" ([25]). Whereas it was the appellant's case that she did not undergo FGM until after she returned to Kenya in 2000.
5. Mr Jarvis' approach was the proper one as the basis of the judge's conclusions on credibility are undermined by a misunderstanding of the

facts of the appellant's claim, including as to when she was circumcised and when she was held captive; it being the appellant's case that it was only in 2004 when her second "escape" failed that she was actually imprisoned and held captive, whereas the judge concluded, at [29], that the appellant's evidence showed that she had flexibility whilst living in Kenya, was able to retain her passport and travel and these were not the actions of a women imprisoned by the Mungiki and kept prisoner in her husband's compound as claimed.

6. It was conceded that the errors went to the heart of the credibility findings. Although Mr Jarvis maintained that it is the respondent's case that ultimately the appellant cannot succeed under any of her protection claim grounds, in this decision the human rights consideration was also flawed in that it was predicated on the basis that it was safe for the appellant to return, whereas I accept that those findings cannot stand.
7. The decision of the First-tier Tribunal contains an error of law. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Although I was initially minded to retain the appeal in the Upper Tribunal, bearing in mind the nature and extent of the findings to be made, the matter should be remitted to the First-tier Tribunal, other than before Judge Grant or Judge Malcolm, under Section 12(2)(b)(i) and further to 7.2(b) of the Presidential Practice Statement.

Directions

8. As discussed at the error of law hearing, the First-tier Tribunal would benefit from a further up-to-date medical report for the appellant including to address her fitness to give evidence at that remitted hearing and to address whether her condition has improved or deteriorated in the interim. The appellant's representatives are directed to provide such a report no later than twenty one days prior to the re-listed hearing.
9. In addition, Mr Pipi referred to ongoing difficulties with the medical report in the appellant's bundle from 2015. Although the fact that the appellant had been subjected to FGM was accepted by the First-tier Tribunal (although the circumstances of that circumcision were not accepted), Mr Pipi confirmed that a page missing from the report of Dr Comfort Momoh, dated 30 April 2015, had been repeatedly raised throughout the appeals' process. This report is contained at pages 32 to 36 of the appellant's bundle and indeed appears to stop at paragraph 21 on page 34 of the appellant's bundle and recommence at paragraph 27. It was not entirely clear as to whether this was a mistake on the part of the author, or a mistake on the part of the appellant's then representatives in sending only part of the report, or a mistake on the part of the respondent in only photocopying part of the report. Mr Jarvis confirmed that the only copies of the report that were available to the respondent were also missing paragraphs 22 to 26. Although Mr Pipi conceded that it may well be that the missing pages are of no import, he agreed that the best course of action would be for the appellant's representatives to approach the

original author to either obtain a full copy of the original report and/or ascertain whether it was a case of misnumbering. If such is not possible, Mr Pipi indicated that he would obtain a fresh report, either from Dr Momoh or another expert, if the appellant's medical condition permits.

Conclusion

10. The decision of the First-tier Tribunal is set aside and remitted to the First-tier Tribunal.

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 her or any member of her 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: 24 January 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT
FEE AWARD**

No fee was paid or payable so no fee award is made.

Signed

Date: 24 January 2018

Deputy Upper Tribunal Judge Hutchinson