Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07892/2016

THE IMMIGRATION ACTS

Heard at UT (IAC) Hearing in Field House	**Decision & Reasons Promulgated**
On 16th January 2019	**On 14th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD

Between

MR BC
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Benfield, Counsel, instructed by Duncan Lewis & Co
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Zambia whose appeal on all grounds was dismissed by First-tier Tribunal Judge Lingam in a decision promulgated on 17th August 2018.

2. Grounds of application were lodged and permission to appeal granted by First-tier Tribunal Judge Osborne in a decision dated 18th September 2018.

3. The Grounds of Appeal are extensive. They are broken into several parts.

4. The first ground is (a) namely unreasonable delay. It is said that the appeal took forever to kick off and was muddled in administrative hiccups. Documents were misplaced. The case was finally heard on 29th September 2017. The matter was adjourned again for instructing solicitors to arrange the attendance of Dr Agarwal on the basis that there was a need to clarify what the judge perceived was a conflict between his report and that of another expert, Dr Walsh. Judge Lingam did not issue any written directions to that effect.

5. There then followed a period of the agents endeavouring to ascertain what the current situation in the case was before the appeal was listed again on 12th February 2018. Effectively a case management hearing took place at that point. Directions were issued whereby parties had to file written submissions to conclude the hearing and that was done on 12th March 2018 and the decision was made on 17th August 2018 some five months later. This was technically eleven months between the hearing of the witnesses and recording the evidence and no explanation had been given for what was said to be, inordinate and unfair delay. Reference is made to various case law, including **SS (Sri Lanka) [2018] EWCA Civ 139** where it was recognised that there was no Rule that a delay of more than three months between the hearing of the oral evidence and the date of the Tribunal's decision would render the decision unsafe. Nevertheless, this was a case where the delay was substantial.

6. Under (b) it was said there was a failure to apply anxious scrutiny. Judge Lingam had said that when reading the reports from the medical officers this had raised some concerns for her. However, she did not say what those specific concerns were or where to find them.

7. The judge had made an error in stating that the Appellant had been stopped in 2009 for possession of class A drugs when in fact it was a class C drug, cannabis. The mistake that the judge made in determining that this was a very dangerous drug may have clouded her mind. A number of facts are said to have been recorded incorrectly.

8. Under (c) there was a failure to take into account the Appellant's vulnerability. He was a vulnerable young adult and his attention and concentration was variable according to the evidence presented (paragraph 24 of the grounds).

9. Furthermore, it was said under (d) that the judge had made speculative findings. The judge had said at paragraph 90 that the Appellant would have relatives in Zambia to support him with his mental illness but there was no basis for that finding. It was pointed out that Mrs Murasa, the client's witness and carer, was resident in the UK but was originally from Tanzania and had nothing to do with Zambia.

10. The judge had speculated that Mrs Murasa could continue to support the applicant in Zambia but there was no evidence for that in the statement. There was enough evidence to show that the Appellant would not be able

to access treatment or therapy in Zambia and this would make his condition deteriorate and increase his suicide risk. Under (e) there was a failure to consider the medical evidence and there was no basis to allege that the Appellant did not act on the recommendations from Dr Agarwal. The judge had accused Dr Agarwal of making credibility findings on the asylum claim (paragraphs 48 and 49) but Dr Agarwal had not delved into that field at all.

11. Before me Ms Benfield relied on her grounds. I was asked to set the decision aside and order a de novo hearing before the First-tier Tribunal. The substantial grounds of delay were made out. The Appellant had not been treated as a vulnerable witness. There was country material in relation to the plausibility of his actions but that had not been dealt with. There was a lack of proper findings. In response to submissions from Ms Jones, Ms Benfield pointed out that the decision had in fact taken eleven months from when the evidence was presented and this was an unjustified delay. The findings were opaque. A distinct Article 3 case had been presented- indeed she had presented it. No reasonable observer could conclude that the Appellant had had a fair hearing.

12. For the Secretary of State Ms Jones referred me to **SS (Sri Lanka)** on the issue of delay. A period of four months there had not resulted in an error of law being shown. As such the Appellant had failed to prove there had been an unreasonable delay under ground (a). The judge had applied anxious scrutiny by looking at the medical evidence very carefully. Nothing under ground (b) was material. Contrary to the grounds the judge had taken into account his vulnerability under ground (c). The judge was correct to note that he had been an overstayer, that he had sold the family home, that he was the sole heir of the property, and that he had arrived on a visa. There was no unfairness to the Appellant. In terms of the speculative findings under ground (d) it was said that there was nothing material to those grounds. The witness Mrs Murasa had supported the Appellant in the past and there was no reason why she would not be able to do it in the future. The judge had properly considered the medical evidence all as noted in the decision. There was no separate case made under Article 3. I was asked to uphold the decision.

13. I reserved my decision.

Conclusions

14. I should point out one issue in the grounds with which Ms Benfield did not continue to support, namely what is said in paragraph 7 that the Appellant had a legitimate expectation that his appeal matter would be determined within a month as is usually the norm.

15. However, there is no doubt that there has been a considerable (and in my view unacceptable) delay in this case. In effect the delay is really one of eleven months because of the fact that all the evidence was given eleven months before the judge issued her decision. The case law of **SS (Sri**

Lanka) is clear enough that a delay of three months is not fatal to the outcome but here the delay is one of effectively eleven months which goes a long way to the consideration of whether the decision may be unsafe. Quite why it took another five months from when the submissions were received for the judge to write a decision is not explained.

16. What is very troubling in this case is that at no point in the decision does the judge set out the basis of the Appellant's claim. While it has been said on many occasions that a decision is written for the benefit of parties it should also be written for the benefit of an appeal judge who then may have to listen to an argument that there has been unfairness. For whatever reason the judge simply did not set out the basis of the Appellant's claim and the reader is left in a fog trying to work out exactly what the Appellant's claim is. The Appellant did provide a witness statement but the judge does not rehearse its terms. Instead she launches into his oral evidence and without the benefit of the terms of the witness statement being set out the reader is at somewhat of a loss to know whether or not the judge has made proper factual findings. As such the decision is not a stand alone document. It is necessary to look at the witness statement to see what the Appellant's case really is. When I do that it is quite clear that the judge has not made careful factual findings on the matters set out by the Appellant in his witness statement and although not specifically focused on in the grounds of application it seems to me that this is a very significant failure by the judge which goes a long way to supporting the proposition that there is a material error in law in the decision.

17. Paragraph 15 of the grounds of application has force. The judge did not say what the concerns were about the medical reports and did not take the matter further. I doubt the Appellant can be blamed for failing to provide the Respondent with his Rule 35 report. There seems to be a mistake about whether or not the Appellant was stopped for possessing a class C drug or a class A drug. Paragraph 19 points out a possible failure by the judge in concluding that the Appellant did not give accurate answers about his family. There is a question mark over whether the Appellant was treated properly as a vulnerable young adult. When the judge said that he would have relatives in Zambia to support him with his mental illness (paragraph 30 of the grounds) it is said that there is no basis for that finding and no evidence to support such a finding. There is a question mark over whether the judge was entitled to find that Mrs Murasa would continue to support the Appellant in Zambia. It is said in the grounds that the judge had accused Dr Agarwal of making credibility findings on the asylum claim which he did not do. All these factors suggest a causal connection between the delay and the decision being unsafe.

18. Taking all these matters together I find that these are cumulatively enough for me to conclude that this judgment is unsafe; I am particularly concerned about the very lengthy delay in the hearing of the evidence to the issuing of the decision and the fact that the Appellant's case has not

been set out in the manner it should have been, let alone in any proper detail. These failures give force to the submission that the factual findings that the judge did make are not ones which can be relied upon. Looking at all the issues before me I have concluded that the judgment must be set aside as it is not safe to rely on the judge's findings as being correct.

19. Following that conclusion, further fact-finding is necessary and the matter will have to be heard again by the First-tier Tribunal.

20. The decision of the First-tier Tribunal is therefore set aside in its entirety. No findings of the First-tier Tribunal are to stand. Under Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 the nature and extent of the judicial fact-finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

22. I set aside the decision.

23. I remit the appeal to the First-tier Tribunal.

Signed *JG Macdonald* Date 8th February 2019

Deputy Upper Tribunal Judge J G Macdonald