



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02163/2019 (V)

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype
On 8 December 2020

Decision & Reasons Promulgated
On 6 January 2021

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

LEE KATHINGO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik, Counsel

For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

Given ex tempore

1. This is an appeal against a decision of First-tier Tribunal ('FtT') Judge Mark Davies sent on 21 January 2020, in which he dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Malawi who was born in the year 2000 and is therefore 20 years old. He claims to have entered the United Kingdom ('UK') in 2008 when he was just 8 years old with his maternal uncle. He also claims that his uncle returned to Malawi and left him with a friend whom he referred to as an uncle although he was not a biological uncle. He stayed with that uncle until around 2015 and then the appellant was more or less, according to him, left on

his own and ended up street-homeless in Manchester, developing an alcohol problem. He claims that around 2017 he met his biological mother, whom I shall refer to as 'the mother', by coincidence in the Manchester area. He then began living with the mother.

3. The made an application to remain on the basis of asylum and human rights on 6 February 2018. The respondent refused that application in a decision dated 21 February 2019. The respondent did not accept the appellant's claim to have lived in the UK since 2008. The respondent noted that the asylum claim was vague and that was also rejected. The asylum claim has since not been resurrected and I need say no more about it.

Procedural history

4. The appellant appealed against the respondent's decision to the FtT. That hearing took place before FtT Judge Thorne on 15 April 2019 ('the 2019 FtT'). I need say little about that decision because it was set aside by Deputy Upper Tribunal ('UT') Judge O'Ryan in a decision promulgated on 8 August 2019. It may be helpful to spend a little bit of time on Judge O'Ryan's decision. He outlined the position of the parties at 2 to 4 of his decision and then set out the grounds of appeal at 8. He said this:

"It was argued that the judge had erred in law in failing to consider that the appellant had mental health problems and other associated problems during the hearing. It was said that the judge had failed to take proper account of a report from a social worker. It also appears to be argued that the judge erred procedurally in failing to take steps to ensure that the appellant could properly participate in the proceedings as the social worker's report disclosed that he ought to be treated as a vulnerable witness."

5. Judge O'Ryan made further reference to the social worker's report and described it more fully as a children and families assessment prepared by Salford City Council dated 14 March 2018. I shall refer to this as 'the LA assessment'. This sets out the appellant's reported history in the UK and circumstances, he having been brought to the attention of Salford City Council by the respondent following the appellant's screening interview (the referral being made on the basis that it had been alleged that the appellant had been in the UK since he was a young child. Judge O'Ryan rejected the submission that the 2019 FtT erred in law, either procedurally or substantively, in failing to have proper regard for the LA. Judge O'Ryan was of the view that there was nothing within the LA assessment supporting the appellant's proposition that he was unable to give evidence or should be treated as a vulnerable witness and the 2019 FtT sufficiently took it into account - see [12] of the UT decision.
6. Judge O'Ryan, however, raised a separate matter not identified within the appellant's grounds of appeal. He noted that on the appellant's account that he had spent half his life in the UK, and concluded that the judge did not adequately address 276ADE(1)(v). Judge O'Ryan considered that it was

important that the FtT addressed the claim that the appellant had resided in the UK from 2008 and in the absence of any clear finding of fact as to that, the matter needed to be redecided. Judge O’Ryan noted this at [17]:

“Whilst there may be only a slender chance of the appellant being able to satisfy to the balance of probabilities that he had been physically present in the United Kingdom since 2008, I cannot exclude it as a possibility if that matter were to be properly adjudicated upon.”

Judge O’Ryan noted at [18] that there was some evidence that the FtT upon remittal would have to grapple with. This included a copy of an application for entry clearance that was on the Tribunal’s file, seemingly provided by the respondent before the 2019 FtT.

7. The matter then came before FtT Judge Davies upon remittal. At the hearing the appellant was represented by Counsel, Mr Holmes. The appellant is now represented by Mr Karnik. Mr Holmes is an experienced Counsel in this jurisdiction, and known to this Tribunal for his careful preparation and submissions on behalf of appellants. I enquired as to whether there was a skeleton argument available to Judge Davies, but it appears that one was not provided. Judge Davies noted the observations of Judge O’Ryan and the lack of any application to treat the appellant as a vulnerable witness, and declined to treat the appellant as such. Judge Davies also made clear adverse credibility findings regarding the appellant, his mother and his stepfather, all three of whom gave evidence before him. I shall turn to that reasoning in more detail later on.
8. Grounds of appeal were prepared by the appellant’s solicitors (not Mr Holmes). Those grounds make two, perhaps three points. It is difficult to tell because the grounds are not clearly enumerated or pleaded. Mr Karnik confirmed that the two points that arose from the grounds could be summarised as follows:
 - (1) Judge Davies erred in law in failing to treat the appellant as a vulnerable witness and failing to apply the requisite guidance or the principles set out in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123.
 - (2) Judge Davies failed to address the evidence as to the appellant’s mental health when making its findings. That evidence according to the grounds was said to include the LA assessment and a letter from Achieve, an organisation helping those with alcohol dependency.
9. Although permission to appeal was initially refused by the FtT it was granted by the UT in a decision dated 10 June 2020. Mr Karnik, who, as I have said, now represents the appellant prepared amended grounds of appeal dated 9 October 2020 which he sought to rely upon. The respondent has not provided a Rule 24 notice.

Hearing

10. At the beginning of the hearing I clarified with Mr Karnik the nature of the grounds relied upon in the light of the amended grounds document. He wished to make an application to add one substantive ground to the grounds that had already been pleaded. That ground relates to the judge's findings as to the 2014 visa application form. Mr Karnik argued that the findings in relation to this were inadequate and irrational. I heard from both Mr Karnik and Mr Tan as to the application to amend the grounds. I then heard from each representative in relation to all the grounds of appeal and indicated that I would make my decision as to the application to amend after hearing from both representatives fully.
11. I propose to deal with each ground in the order relied upon by Mr Karnik. I shall deal with the submissions made whilst addressing each ground.

Error of Law

Ground 1 – approach to vulnerability

The pleaded grounds submit that Judge Davies was not 'alive to the possibility' that the appellant may have been a vulnerable witness and did not engage with this matter of its own volition. Mr Karnik expanded upon that submission and reminded me that AM (Afghanistan) sets a very low threshold for vulnerability to apply. He also reminded me of the twin protective measures set out in SB (vulnerable adult) [2019] UKUT 398 (IAC) to this effect: the Tribunal must seek to enable an appellant to give the best possible evidence that he can in the light of any vulnerabilities, and; any vulnerabilities must inform the approach to credibility. Mr Karnik argued that Judge Davies was simply wrong not to consider this appellant to be vulnerable, bearing in mind the evidence that was before it.

12. Whilst it would have been more helpful for the FtT to have directly addressed the relevant guidance on vulnerability and that contained in AM (Afghanistan) and SB (vulnerable adult), when the decision is read as a whole I am satisfied that it cannot be said that the FtT has acted inconsistently with that guidance when the following matters are considered cumulatively.
13. First, Judge Davies made it clear at [10] that in coming to his decision he had read and evaluated all the evidence that was before the respondent as at the date of decision appealed against, together with the additional evidence that had been submitted and that he had taken into account the testimony of all three of the witnesses.
14. By the time of the hearing before Judge Davies, the appellant relied upon a 121-page bundle. That contained *inter alia*, witness statements from himself, his

mother and his stepfather, the LA assessment I have already referred to, a letter from Early Break dealing with his attempts to address his alcohol use from October 2019, and a letter from the North Manchester General Hospital dated 20 September 2019 that says this:

“This gentleman recently was an inpatient on Ward E3 with tactile hallucinations. He was reviewed by the psychiatrist who advised an MRI scan as an outpatient. I am now in receipt of these results. This scan has shown mild non-specific cortical FLAIR signal change in the left frontal and temporal lobes. The radiologist has suggested further MRI imaging if no clinical improvement. This gentleman is followed up by the psychiatrist and they would consider re-imaging if there is no improvement.”

15. Attached to that letter is a document entitled Discharge Medications, which sets out a number of medications that the appellant was given and under the sub-heading ‘Treatment Procedure during Admission’ says this:

“Treated for alcohol withdrawal on admission which was later stopped. Reviewed by MHLT and psychiatry team. Was planned for IP psych bed. Patient lives with mum and was keen to go home. Discharged home with appointment tomorrow at Salford HTT.”

16. That summarises some of the more important evidence that was available to the FtT. It is unfortunate that the FtT did not directly engage with that evidence. However, the appellant’s claim to have turned to alcohol, which caused him mental health difficulties was not the subject of any real dispute, and Judge Davies accepted the appellant had ‘some mental health problems’ – see [72]. Importantly, Judge Davies made it clear, as I have said, at [10] that he had read and evaluated all the evidence. Mr Karnik did not take me to any part of the decision wherein the FtT is said to have reached a conclusion starkly inconsistent with that evidence. Indeed, I note that the appellant’s Counsel submitted that the appellant had turned to alcohol, which caused him mental health difficulties (see [61] of the FtT’s decision), and this appears to have been (see [72]). When the decision is read as a whole, I am satisfied that although Judge Davies did not expressly refer to each item of evidence, he had the relevant evidence in mind when he decided not to treat the appellant as a vulnerable witness.
17. Second, the judge made it clear at [31] and [32] that he had considered the detailed decision of Judge O’Ryan. I have already set out relevant extracts above. Judge O’Ryan addressed the LA assessment in some detail and made it clear that it did not support treating the appellant as vulnerable. It is self-evident that by the time the matter came before Judge Davies, there was further evidence as to the appellant’s mental health but this brings me to the third point.
18. Third, the appellant was represented by a very experienced Counsel yet no application was made to treat him as a vulnerable witness. I mean no criticism

of Counsel in making this observation. That was an assessment consistent with the approach taken by Judge O’Ryan. It was clearly a matter that Judge Davies took into account as set out at [32] and [67]. In my judgment, the 2020 FtT was entitled to take into account that experienced Counsel did not consider it appropriate to make the requisite application to treat the appellant as vulnerable, even though there was further updated medical evidence to the effect that the appellant had suffered with mental health concerns. There is no reason to believe that this was by reason of oversight. Indeed, it seems to me that the reason that approach was taken was because the evidence simply did not support such an application.

19. The fourth matter is based upon the limited nature of the evidence said to demonstrate that the appellant should have been treated as a vulnerable witness. Just because a person has suffered with some mental health concerns in the past does not necessarily mean that he will find it difficult to give his best evidence or that he should be treated as vulnerable. In this particular case the evidence as to the appellant’s mental health concerns was weak. I note that the letter dated 20 September 2019 suggests further inquiries including MRI imaging if there was no clinical improvement. Mr Karnik was unable to take me to any evidence before Judge Davies as to the appellant’s condition not improving. As at the date of the 2020 FtT hearing the mental health concerns seems to have arisen at least partly as a result of the appellant’s withdrawal from alcohol upon admission to hospital, and had thereafter subsided. There is some support for that in the Early Break letter which tends to indicate that the appellant was complying with a programme in support of alcohol reduction and was doing reasonably well or had at least not gotten any worse, by the time of the hearing before Judge Davies on 17 January 2020.
20. I also note that there were three detailed witness statements before Judge Davies. The appellant’s witness statement is dated 8 January 2020 (shortly before the FtT hearing). In that statement he refers to having been diagnosed with liver malfunction, migraines and nose-bleeding as a result of excessive drinking and that he had been prescribed medication to help with alcohol-related medical issues. He had also been referred to Achieve, a drug and alcohol service. There is no reference within that witness statement to the appellant suffering from any lasting mental health concerns. There is also no reference to the appellant describing in what way he might find it difficult to give evidence. This is an appellant who has been represented by solicitors at all material times. Neither his solicitors nor his Counsel considered it justified to make an application for him to be treated as a vulnerable witness and no evidence was led in that respect, as the witness statement makes clear.
21. Although my attention was drawn to the appellant being on medication I was not taken to any evidence to suggest the ways in which that type of medication might render a person vulnerable in any of the senses set out in the relevant authorities.

22. When all of those matters are considered together it is my judgment that there was no error of law in not treating the appellant as a vulnerable witness.

Ground 2 – LA assessment

23. I now turn to the second pleaded ground of appeal, which relates to Judge Davies' approach to the LA assessment. Although that ground makes reference to a letter from an organisation called Achieve that is a very short letter that gives no meaningful information and Mr Karnik did not rely upon it. He focussed his submissions on the LA assessment, which he invited me to note was significant evidence for two reasons. First of all, it demonstrated and provided corroboration for the appellant's claim that he had a history of alcohol dependency and secondly, it provided a detailed account of his life. Mr Karnik also reminded me that this was based upon four separate interviews during the course of February and March 2018 and the FtT should have treated it as significant evidence.
24. It is important to bear in mind that the FtT again made it clear that it had regard to all the evidence before it, which included the LA assessment, and it also had regard to Judge O'Ryan's decision, which referred in detail to the LA assessment. I entirely accept that it would have been far better for the FtT to have engaged with the LA assessment directly. I must, however, determine whether the failure to do so constitutes a material error of law.
25. Mr Tan pointed out that the account that is set out within that LA assessment is entirely based upon self-report. When the assessment is considered carefully, and it is a detailed assessment, it is clear that the social worker was not making any assessment as to the well-foundedness of the claims as to the appellant's history, the social worker simply recorded that which had been reported by the appellant and his mother. It is repeatedly said throughout the document that the appellant 'reported' various aspects of his history.
26. Mr Karnik submitted that where, as in this case, a person is reporting upon what took place when he was a child and street-homeless then this sort of documentary evidence takes on greater significance. That may well be but it is still important to carefully scrutinise what is actually contained in the LA assessment. It really does no more than repeat that which the appellant and his mother set out to the respondent and within their witness statements. It is in fact an extension of their 'own testimony' to use the wording of Judge Davies. It did not in any real sense corroborate that testimony, but was an extension of it and consistent with it. As to it providing further evidence that the appellant had a dependence on alcohol, that was not in dispute. Indeed, the appellant said this himself in his statement and there was ample evidence to that effect.
27. When considering whether the failure to specifically address that evidence constitutes a material error of law it is important to read Judge Davies' decision as a whole. The FtT's reasons for rejecting the claim that the appellant was in the UK from the age of 8 is set out from [68] to [71]. Judge Davies noted a total

lack of credible evidence to support the appellant's claim that he had arrived in the UK with his uncle. Although the appellant was very young on his account, there was no such credible cogent evidence from his mother. There has been no dispute that the evidence as to the mechanics by which the appellant entered the UK is simply absent. Now, that might well be understandable if one was expecting a person to recall that which happened to him when he was a young child. For obvious reasons, that would not be within his ability to give but his mother has provided a witness statement and she was unable to provide that evidence.

28. Judge Davies also noted at [69] that there was no evidence before it to set out the purpose of the uncle entering the UK at the time. The point that is made by the FtT at [68] and [69] is that there was an absence of evidence as to those early days which could have been supported by evidence given by the mother, but was not. The FtT also drew adverse inferences from the use of a visa application form at [70], which I address below.
29. Judge Davies also pointed out at [71] that it was not credible that upon entering the UK the mother would not make any meaningful attempt to try to contact or track down her son, given that she had arrived all the way back in 2010. Those reasons seem to me to be open to Judge Davies. Mr Karnik did not take me to any part of the LA assessment which seriously called those findings into question. There is no reason to believe that Judge Davies was unaware of the fact that the appellant and his mother provided a broadly consistent account within the LA assessment..
30. In all the circumstances, whilst Judge Davies' decision could have engaged with the evidence more fully, he gave tolerably clear reasons for rejecting the evidence of the appellant and his mother, as to the appellant's length of residence and history in the UK.

Application to amend – visa application form

31. I now turn finally to the point raised in the amended grounds of appeal dated 9 October 2020, as relied upon by Mr Karnik in relation to 2014 visa application form. Mr Karnik accepted that this ground was added late in the day but invited me to find that it would not have caused the respondent any prejudice and in the interests of fairness it should be admitted and permission should be granted to rely upon it.
32. I first of all considered the length of the delay. I note that in this case the FtT's decision was promulgated on 21 January 2020. There was the opportunity to draft grounds when permission was sought vis-à-vis the FtT and then when permission was sought vis-à-vis the UT. This point was not relied upon at either points. In addition to that, permission to appeal was granted by the UT on 10 June 2020 and Judge Norton-Taylor gave directions on 10 August 2020. The matter was not raised timeously after those two decisions were made. Indeed, the amended grounds come just short of two months after Judge

Norton-Taylor's directions and about eight months after when they initially should have been raised. I regard that delay as substantial.

33. I turn to the reasons that have been provided for the delay. Mr Karnik candidly accepted that in effect this was because he had not been instructed earlier and that the matter perhaps raised a technical aspect of the law that those who instructed him had missed when they drafted the grounds of appeal. I do not consider that the matters raised in the amended grounds raise a technical or complex matter of law. It is a straightforward point – it is said that the judge was not entitled to reach the finding of fact that he did regarding the 2014 application form.
34. I have gone on to consider whether there are any other compelling circumstances to admit the application for permission late. Mr Karnik did not take me to any such compelling circumstances. Having considered all relevant matters I refuse to extend time to enable Mr Karnik to rely upon this ground of appeal. In case I am wrong on all of that I have considered the amended ground in any event. Mr Karnik has submitted that the visa application form was made at a time when the appellant would have been 14 and not 24 (the age of the applicant on the visa application form). This appellant's age has never been in issue.
35. It is important to note the precise way in which Judge Davies addressed this part of the evidence at [70]:

“The appellant and his mother accepted that the visa application that was shown to them did contain correct details regarding the appellant and his mother and it appears to me more probable than not that the application for a visa to enter the United Kingdom was made by the appellant on 7 November 2014 in all probability arranged by his mother to enable him to enter the United Kingdom from Ireland. That clearly totally undermines the appellant's claim to be in the United Kingdom since 2008. I do not believe that he was in the United Kingdom since 2008. The lack of evidence supports that finding.”
36. Judge Davies found that the appellant and his mother had not clearly explained why an application had been made in 2014 in the circumstances that it had been made. This was a matter that had been raised before the 2019 FtT. That is clear because in Judge O'Ryan's decision (at [18]) he noted that the 2014 entry clearance application was seemingly provided by the respondent at the hearing before the 2019 FtT. That, however, has not been the subject of any observations or evidence within the witness statements of the appellant and / or his mother. In those circumstances, the FtT was entitled to make the finding it did. It might be considered to be a harsh finding to make but in my judgment it was not irrational or perverse, given the absence of any clear explanation from the witnesses.

37. For all those reasons, the grounds of appeal have not been made out. I wish to record that Mr Karnik said and did everything he possibly could on his client's behalf, and I am grateful to him and Mr Tan for their helpful submissions.

Decision

38. The FtT's decision does not contain an error of law and is not set aside.

Signed: *Ms M Plimmer*
Upper Tribunal Judge Plimmer

Dated: 16 December 2020