



**IN THE UPPER TRIBUNAL  
IMMIGRATION  
AND ASYLUM CHAMBER**

**Case No: UI-2023-000056**

**FtT No: PA/55905/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 20 November 2023**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**AMINAT ABIMBOLA ARE**  
(no anonymity order)

Appellant

and

**S S H D**

Respondent

**Heard at Edinburgh on 8 November 2023**

*For the Appellant: Mr K Forrest, Advocate, instructed by McGlashan MacKay, Solicitors*

*For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer*

**DECISION AND REASONS**

1. FtT Judge Montgomery dismissed the appellant's appeal by a decision dated 14 October 2022. The FtT refused permission to appeal to the UT.
2. The appellant sought permission from the UT on grounds set out in her application dated 5 January 2023.
3. Her first point, at [2 - 2.2] of her grounds, is that the FtT erred at [80] by finding article 3 not to be "engaged" by reference to *N* [2005] UKHL 31, which no longer applies, because the test is now set out in *AM (Zimbabwe)* [2021] AC 633.

4. Her second point, at [3], is that the FtT erred in concluding that her evidence about her family in Nigeria was inconsistent. She asks for “a copy of the audio recording” of her evidence. She says that the oral evidence as recorded by the Judge is so inconsistent with her other evidence that she may have been misunderstood, and the matter should have been raised with her or with her representative.
5. The grounds at [4 – 7] contend that the Judge was wrong to give little weight to the opinions of Dr Ross (on the appellant’s mental health) and of Ms Nkeokelonye (a country expert) in light of having family in Nigeria; and that the Judge was also wrong in considering that those reports did not warrant departure from previous findings.
6. On 3 February 2023 Ut Judge Blundell granted permission:
  1. I grant permission for two reasons in this case.
  2. Firstly, although she was not assisted in this respect by the skeleton argument presented by the appellant’s solicitor, the judge cited and applied *N v United Kingdom* (2008) 47 EHRR 39 rather than *AM (Zimbabwe) v SSHD* [2021] AC 633 when considering the Article 3 ECHR claim which was (only) articulated in oral submissions: [33] of the judge’s decision refers. The judge who refused permission to appeal at first instance proceeded on the basis that this made no difference to the outcome. Having considered the expert report of Dr Mary Ross, I cannot confidently reach the same conclusion and I recall that such questions of materiality are ordinarily for oral argument.
  3. Secondly, I note what is said about the appellant’s oral evidence that she has family in Nigeria. It is clearly a point which was significant in the judge’s assessment and, as noted in the grounds, it is clearly a matter in which the appellant’s oral evidence differed fundamentally from what she was recorded to have said before. Insofar as it is suggested that the judge should have taken steps to clarify the evidence (etc), I reach the same conclusion as the judge who refused permission to appeal; the appellant was represented by a solicitor and that could have been done by her if it was to be suggested that there was any ambiguity or lack of clarity.
  4. There is some suggestion in the grounds, however, that the appellant’s evidence was not as noted by the judge, and that the recording of the proceedings has been requested from the FtT so as to consider precisely what was said. Had it not been for my first concern, I would probably have refused permission on this basis; if doubts such as this are to be raised, they should be supported by a note from the advocate (who, I note, continues to act for the appellant). Be that as it may, I am just persuaded that there might be something in this point and I am prepared to grant permission in order that it might be considered with the benefit of the recording.

5. The grounds overlap to an extent, particularly as regards the experts' reliance on the appellant having no family in Nigeria. It is for that reason that I do not restrict the scope of this grant of permission to appeal.
7. The argument for the appellant on article 3 risk depended on the weight to be given to the expert reports, which was said to turn on the Judge's misapprehension of the oral evidence; so I find it convenient to take the appellant's two main points in reverse order.
8. As the Judge granting permission made clear, if the Judge was mistaken about the evidence, that was for the appellant to establish. That might be approached, for example, by statements from her and from the solicitor who represented her in the FtT and copies of the record kept on her side (all of which should have accompanied the permission application); by obtaining, listening to and transcribing the relevant parts of the recording of the hearing; by asking the respondent's representative for their understanding of the evidence; or by asking the FtT to supply a copy of the Judge's written record. Although the grounds say, "... agents have requested a copy of the audio recording", none of those obvious steps have been accomplished.
9. Mr Forrest advised that a request was made for the audio recording the day before the hearing in the UT and that he had (wisely, in my view) counselled against seeking an adjournment until that was available.
10. In any event, a reading of the decision negates the proposition that the appellant may have been misunderstood and taken by surprise. At [21] the Judge summarised her oral evidence in 13 bullet points, the last of which is that she has "a brother, two step-sisters and a step-brother in Nigeria." At [26], the Judge records the submission for the respondent that the appellant has relatives in Nigeria, "...a fact that the expert ... appeared to be unaware of". The matter was out in the open. The submissions for the appellant, recorded in detail at [29 - 35], say nothing about it. At [49] and [69-70] the Judge expresses her concern over what the experts were told and finds that those discrepancies detract from their reports. That analysis is impeccable. There was no absence of opportunity to deal with the matter by way of re-examination or submission.
11. On the article 3 issue, submissions did not draw attention to anything in the reports, even taken at their highest, by which the appellant's case might realistically have been found to require protection by reference to the test in *AM*.

12. There is no error in the Judge's reasoning, which is not confined to the matter of family in Nigeria, for giving little weight to the reports. It is immaterial that she did not refer to the leading authority.
13. (I note, incidentally, that this lapse was contributed to by the failure of representatives on both sides to cite *AM*.)
14. The appellant has shown no material error of law, no misapprehension of the evidence, and no unfairness. The decision of the FtT stands.
15. No anonymity order has been requested or made.

Hugh Macleman

Judge of the Upper Tribunal, Immigration and Asylum Chamber  
13 November 2023