Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07495/2012

THE IMMIGRATION ACTS

Heard at Field House **Determination Sent**
On 21 June 2013

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AW

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N. Weiniger, Counsel instructed by Palis Solicitors
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant, whose date of birth is 1 April 1990, arrived in the UK from Kenya on 23 January 2005, aged 14 years. Her entitlement to citizenship of Kenya is in issue but it appears that Kenya is the country of her former habitual residence and is the country of proposed removal.

2. She was granted discretionary leave from 5 June 2006 until 31 March 2008. She made an in-time application on 28 March 2008 for further leave to remain on the grounds of asylum. That application was refused and it is against the immigration decision to refuse to vary leave to remain that she appealed to the First-tier Tribunal.

3. Her appeal was dismissed by First-tier Tribunal Judge S. Taylor after a hearing on 10 September 2012. Permission to appeal against that decision having been granted, the appeal first came before me on 8 February 2013 when it was adjourned after I had started to hear submissions on behalf of the appellant. A new point was raised, namely whether the respondent's failure to consider the appellant's case under the 'legacy' process meant that the immigration decision was not in accordance with the law. I granted permission for the grounds of appeal to be amended to add that ground. On 21 June 2013 I heard submissions from the parties on that and the other grounds, the parties relying on their skeleton arguments filed and served in accordance with directions I gave after the hearing in February.

4. Part of the background to the appellant's immigration history is, as confirmed in Ms Isherwood's skeleton argument at [7], that the appellant's case was identified as a legacy case and was to be considered under that process. With the skeleton argument are copies of relevant correspondence. On 16 November 2009 the appellant's representatives were written to, effectively stating that hers was identified as a 'legacy' case. The letter of 11 November 2010 indicates that the Case Resolution Directorate ("CRD") would be responsible for her case.

5. In this context, I referred the parties to the decision of the Upper Tribunal in AZ (Asylum-'legacy' cases) Afghanistan [2013] UKUT 00270(IAC).

The appellant's claim and the First-tier judge's determination

6. The appellant's claim as put to the First-tier Tribunal, in summary was as follows. She was born in Somalia to a Muslim father who was a Somalian national. Her mother was a Kenyan Christian. The appellant's father was killed because he was married to a Christian.

7. The appellant's pregnant mother was raped by four men in front of her. Her mother died as a result of the attack and the appellant and her brother went into hiding and then lived on the streets of Mogadishu until they stowed away on a truck going to Kenya. They lived on the streets in Nairobi. The appellant was raped at the age of five and needed hospital treatment.

8. She was able to go to school free and worked in the evening for a woman selling illegal beer to men. However, she was regularly sexually abused because she was from Somalia, and her brother would be

beaten. She was repeatedly raped. The appellant's brother was killed when the appellant was 13 years old, he having reported to the police the abuse they were suffering. Some men came and took him away and she never saw him again.

9. The same men told the appellant that she had to get married but that she must be circumcised first. She was helped to leave Kenya by a man who knew her brother.

10. The appellant arrived in the UK using a false passport stating that she was 24 years of age. She was told by the agent that she had to find a job and she started work as a carer. She was detained by the UKBA in February 2006.

11. Judge Taylor found at [17] that, in relation to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 the appellant had followed an arranged plan to work in the UK, having been provided with a NI number, two birth certificates and fifty pounds. She failed to claim asylum until arrested as an illegal entrant. She was able to fend for herself, travel around, find accommodation and employment, these being factors which contradicted her claim to have been unaware of being able to claim asylum. In the same paragraph he found that she is an intelligent and resourceful person, having obtained A levels and a law degree in the UK.

12. At [18] he concluded that she had given inconsistent evidence in relation to a person, Steve, who is said to have helped her. Her account of Steve’s involvement in bringing her to the UK lacks credibility.

13. Judge Taylor concluded at [19] that the appellant's claim that she was sexually abused and repeatedly raped lacked credibility, bearing in mind that she had not provided any medical evidence, gynaecologists report, or psychiatric report or evidence in relation to any counselling.

14. In relation to her account of her brother being missing or dead, her account was also inconsistent [19]. At [20] it was concluded that there was no reliable evidence that the appellant was either born in Somalia, that her father was a Somali citizen or that the appellant is a Somali citizen. She had not given a credible account of assistance having been sought from the Kenyan police and that assistance having been refused [21]. Her claim in that respect is undermined by what she said about having received free education for eight years at a school for street children and receiving free meals. In addition, the fact that she received hospital treatment showed that she was not discriminated against on account of her claimed mixed parentage.

15. Her claim that she would be recognised by her abusers on return, after ten years, was not credible [22]. She would not be at risk of FGM [24].

16. In relation to Article 8, it was concluded that the appellant did not meet the requirements of the Immigration Rules and her removal would not breach her rights under Article 8 of the ECHR.

Submissions

17. I summarise the parties' respective submissions made to me on both hearing dates. Mr Weiniger relied on the grounds of appeal to the Upper Tribunal and the skeleton arguments. It was submitted that notwithstanding the decision in AZ, the legacy point was still relied on, although it was no longer suggested that the immigration decision was flawed on the basis that the decision was not taken by the appropriate officer of the CRD or the Case Assurance and Audit Unit ("CAAU"). In this context Ms Isherwood's skeleton argument refers to the CRD instructions appended to the skeleton argument.

18. For the appellant it was contended that there are two factual matters that underpin the legacy argument. The first is that by 10 March 2011 there had been a three year delay from the date of the appellant's application for further leave to remain made in March 2008. The second is the length of time that she has lived in the UK with leave prior to the date of decision, a period of six years. I was referred to the decision in Mohammed [2012] EWHC 3091 (Admin), in particular at [34].

19. It was submitted that in AZ the matter of delay was not a factor and thus AZ can be distinguished on the facts. It is clear from Mohammed at [37] that delay need not be culpable. The bare fact of the passage of time was sufficient.

20. Referring to the letter from the UKBA dated 16 November 2009, Mr Weiniger referred to the fact that it states that the appellant's "immigration status and entitlements will remain unchanged until such time as the UK Border Agency has considered the case." She had an entitlement to be considered under the legacy policy. That was more than a matter simply of legitimate expectation. The correction of an injustice as identified in Mohammed applied in the case of this appellant even though paragraph 353B of HC 395 (as amended) applied.

21. The refusal letter in relation to the immigration decision under appeal did not consider the legacy issues, for example the length of residence.

22. Ms Isherwood submitted that the arguments advanced on behalf of the appellant were simply disagreements with the decision in AZ. The appellant had been sent a letter dated 11 November 2010 (Appendix B to the skeleton argument) asking for further information but as far as she was aware none had been forthcoming.

23. At [202]-[203] of the refusal letter the delay in dealing with the appellant's case had been accepted. The refusal letter took into account the appellant's history, her discretionary leave, the country situation

and the delay. There was nothing more that needed to be taken into account. The “entitlements” referred to in the letter of 16 November 2009 was a reference to employment and education.

24. In reply Mr Weiniger repeated that there is no hint in the refusal letter that legacy factors were taken into account. The fact that the appellant had six years discretionary leave was not referred to in the refusal letter.

25. The other grounds of appeal aside from the legacy point were relied on. Ms Isherwood conceded that initially she had had some concerns because of the judge's reference to the lack of medical evidence in relation to the alleged sexual assaults. However, the First-tier judge had noted the lack of evidence of any counselling, which he was entitled to do. In any event, the issue of medical evidence was not material given the other credibility issues.

26. Although the judge had not expressly referred to the delay in the decision making, he had taken into account the length of time that the appellant had been here and the time she had spent in education.

27. In relation to the grounds alleging that the appellant's age was not given appropriate consideration in terms of assessing credibility, the judge had set out her history and it is evident that he recognised her age at relevant times. Other negative credibility findings were referred to and it was submitted that the judge had been entitled to make those findings. Any error of law was not material to the outcome of the appeal.

28. I was addressed by both parties on the question of the judge's assessment of the appellant's nationality.

Error of law-assessment

29. At the hearing on 8 February 2013 it was conceded on behalf of the respondent that in the light of recent authorities, the decision to remove the appellant under section 47 of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act”) was not in accordance with the law, being made as it was at the same time as the decision to refuse to vary leave to remain.

30. So far as the ‘legacy’ issue is concerned, it seems to me on reflection that I was perhaps over generous in permitting the grounds of appeal to the Upper Tribunal to be varied to add that as a ground. It was not in the original grounds of appeal to the First-tier Tribunal, in any skeleton argument at that time and was not advanced at that hearing. Nor was it in the original or renewed grounds of application for permission to appeal to the Upper Tribunal. It is difficult, if not impossible, to see how it could be said to have been an error of law for the First-tier judge to have failed to consider it when it was never advanced before him. If it is

suggested that it was a matter that was obvious in the 'Robinson' sense, the answer is that if it was so obvious one would have expected it to have been raised before the hearing before the Upper Tribunal. I do not consider that the point is at all an obvious one.

31. Putting aside the question of whether the judge could be said to have erred law in failing to consider the point when it was not taken, I am in any event not persuaded that there is any merit in the legacy argument, notwithstanding the very careful and lucid submissions made by Mr Weiniger.

32. It does appear from the information in the correspondence very helpfully provided by Ms Isherwood that the appellant's case was identified as one of those that was to be dealt with as part of the backlog of older asylum claims. The background to the process whereby those older claims were to be considered is explained in the judgements in Hakemi [2012] EWHC 1967 (Admin) and Mohammed.

33. However, as explained in AZ, the fact that an appellant's asylum claim has been identified as a legacy case does not render a subsequent appealable immigration decision unlawful where no decision under the legacy process had been made before the immigration decision.

34. I cannot see that AZ can be distinguished for the reasons advanced by Mr Weiniger. The circumstances of all cases will inevitably be different. What legacy cases will inevitably have in common are periods of delay of one sort or another, and residence for an appreciable period. I do not see that the reference to the appellant's "entitlements" in the 16 November 2009 letter advances the argument. The letter indicated that the appellant's claim was being considered as a legacy case. The statement that her immigration status and entitlements would remain unchanged until such time as the UKBA had considered her case is clearly a reference to something other than the legacy 'entitlement', if it can be described as such.

35. Accordingly, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal on the basis of the 'legacy' issue.

36. However, as much as I am not persuaded that there is any merit in the legacy argument, I am persuaded that the decision of the First-tier Tribunal contains errors of law in three other respects.

37. At [19] the judge noted the appellant's claim that she was seriously sexually abused and raped repeatedly from the age of five to fifteen. One of the reasons he gave for rejecting the credibility of her account was that she had not submitted any medical report "in support of her initial claim or her current claim for further leave." The judge made the point that the appellant had been represented. He went on to reinforce the point about the lack of medical evidence by stating that she had not

submitted any “supporting gynaecologist’s [report]” and had not explained the absence of such a report.

38. Several points are made about this in the grounds of appeal, not least in terms of whether medical evidence could prove the abuse that the appellant claims occurred. It is also suggested that at the age of 15 years, (she was three months short of 15 when she arrived), it was not reasonable to expect her to have undergone an intimate examination to establish the veracity of her claims.

39. Ms Isherwood indicated that this is a matter that had, initially at least, caused her concern. Although it was accepted that the judge was wrong to reject the credibility of that aspect of her account because of the lack of medical evidence, Ms Isherwood contended that any error of law in that regard was not material given the other adverse credibility points. She suggested, for example, that the judge was entitled to take into account that there was a lack of evidence of any counselling in the form of any report. However, at [11] it is recorded that the appellant said in evidence that she had not sought *professional* counselling but had a close relationship with her pastor. Even if the judge was entitled to take into account the lack of evidence from the pastor, I am not persuaded that that, or the other adverse credibility findings, renders the error of law in relation to medical evidence immaterial to the outcome of the appeal.

40. In any event, the adverse credibility assessment suffers from what I regard as another fundamental flaw. The judge made adverse credibility findings with reference to the appellant not having applied for asylum until she had been in the UK for about 15 months. At [18] he referred to the appellant having claimed that she was unaware of asylum or protection when she arrived yet, he concluded, she was nevertheless able to fend for herself, travel around, find accommodation and find stable employment. He found that it was not credible that the appellant was unable to seek advice if she wished to do so. He then referred to the appellant having obtained A levels and then a degree, having come through the UK education system.

41. The grounds assert, and I agree, that the judge did not give appropriate consideration to the appellant's age at material times. She arrived when she was almost 15. Whilst the appellant has, according to the refusal letter, used different dates of birth, the refusal letter refers at [43] to a Merton compliant age assessment which gave her date of birth as 1 April 1990, which is what she now claims it to be. The refusal letter accepts at [45] that that is her age. The judge did make reference in the determination to the appellant's age on arrival and referred to the appellant's ability to have ‘survived’ as it were, after her arrival. However, I do not consider that in finding against the appellant in terms of when she made her claim, the judge gave any, or any adequate, consideration to the fact of her age at that time in terms of her appreciation of the need to seek international protection in the UK.

42. Perhaps more importantly, although there are references in the determination to the appellant's age, in one context or another, the adverse credibility findings overall do not reveal an appreciation of the significance of the appellant's age at the time of the events that the appellant was recounting. At [18] the judge made an assessment of the appellant's claim that she was helped to come to the UK by a person called Steve. There is reference to the screening interview and apparent inconsistency between that and her oral evidence as to payment to Steve. However, when the screening interview took place the appellant was just short of 16 years of age.

43. A consideration in the adverse credibility assessment was also apparent inconsistency between the screening interview and written evidence, and the oral evidence in terms of her brother. In the screening interview it is recorded that he is deceased, and in her "written evidence" that he was presumed dead. At the time of her first witness statement in 2006 she was aged 15. In the witness statement she said that he was killed, but that was in the context of his having been taken away and not seen again, and being told that she would be killed like her brother.

44. A further example of the failure to consider her age is to be found at [21]. The judge took into account that in Kenya, notwithstanding repeated abuse, the appellant did not report the abusers to the police. She did not do so after the 'death' of her brother in 2003 (by which time the appellant was 13 years old). The judge stated that the appellant had two years after the death or disappearance of her brother but took no action. That lack of action was to be contrasted with her having, on her account, received free education and free meals as a street child, as well as hospital treatment.

45. Before finding against the appellant in terms of her failure to have sought the protection of the police, it was encumbent on him to give consideration to her age at the time the events are said to have taken place.

46. The third respect in which I am satisfied that there is an error of law in the determination is in terms of a failure in the proportionality assessment under Article 8, to have regard to the issue of delay. The application for further leave to remain was made in March 2008 but not decided until August 2012. The date at the foot of the notice of decision to refuse to vary her leave to remain, gives a date of April 2012 but the refusal letter is dated 1 August 2012 and that date is given earlier in the notice of decision under the signature of the Secretary of State.

47. The refusal letter itself at [202] makes express reference to the delay of four years (in fact it was almost four and a half years). The renewed grounds of appeal to the Upper Tribunal state at [19] that the issue of delay was raised in the appellant's skeleton argument before the First-tier Tribunal. So it was, albeit that the point was not emphasised. Nevertheless, in Article 8 claims the question of delay is an obvious

point to be considered but in any event, as I have said, it was specifically referred to in the refusal letter. Whilst the First-tier judge did note the length of time that the appellant has been in the UK, that does not address the question of delay and there is no indication in the proportionality assessment that it was taken into account. Whilst Ms Isherwood was right to refer to the fact that the matter was dealt with in the refusal letter, it was for the judge to make an assessment, in line with authority, as to the extent to which that significant delay affected the proportionality of the decision to remove the appellant.

48. I bear in mind that a number of adverse credibility findings were made in the determination. I do not need to set them all out. There are matters which, to a greater or lesser extent, have the potential to undermine the appellant's credibility. Any new assessment of the appellant's claim will have to consider whether the basis of the claimed fear of return is objectively well-founded. Nevertheless, I am satisfied that the errors of law to which I have referred are such as to require the First-tier Tribunal's decision to be set aside in its entirety. It could not be said that the outcome of the appeal could not have been any different but for those errors of law. The question of internal relocation needs to be considered in the context of an appropriate credibility assessment.

49. In these circumstances, it is not necessary to consider the other grounds of appeal to the Upper Tribunal in terms of the judge's understanding of, or appreciation of, the facts and evidence.

50. Both parties agreed that in the event that I decided to set aside the decision for error of law, the appeal should be remitted to the First-tier Tribunal for a fresh hearing. Having regard to the Practice Statement paragraph 7.2, this is what I have decided to do given the extent of the judicial fact-finding required. The appeal will therefore be remitted to be heard *de novo* by the First-tier Tribunal. None of the adverse credibility findings of the First-tier Tribunal are to stand. That includes the judge's findings in respect of nationality. All issues will require a reassessment by the First-tier Tribunal.

51. It was accepted on behalf of the respondent that the removal decision under section 47 of the 2006 Act is not in accordance with the law and I make a finding to that effect. That is not a matter that will need to be revisited but the determination of the First-tier Tribunal will need to record that the section 47 removal decision is not in accordance with the law.

52. So far as the 'legacy' point is concerned, the First-tier Tribunal should consider that matter as settled by this determination. It is not open to the appellant to re-argue that point before the First-tier Tribunal in the absence of any further reported decision of the Upper Tribunal or higher authority.

Decision

53. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the appeal is remitted to the First-tier Tribunal for reconsideration.

DIRECTIONS

1. This appeal is remitted to the First-tier Tribunal in accordance with Practice Statement paragraph 7.2 to be heard *de novo* by the First-tier Tribunal. None of the adverse credibility findings of the First-tier Tribunal in its determination are to stand.

2. The appeal is to be heard by a judge other than First-tier Tribunal Judge S. Taylor.

3. Further directions as to listing may be left to the discretion of the First-tier Tribunal.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

20/07/13