Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04650/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 23 February 2015	**On 24 February 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Doris Oghagbon
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms R Pickering, instructed by Broudie Jackson & Canter
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Doris Oghagbon, with claimed date of birth of 30.11.94, is a citizen of Nigeria.

2. This is her appeal against the determination of First-tier Tribunal Judge Coates promulgated 22.10.14, dismissing appeal against the decisions of the respondent to refuse her asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 29.9.14.

3. First-tier Tribunal Judge French granted permission to appeal on 14.11.14.

4. Thus the matter came before me on 23.2.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Coates should be set aside.

6. The relevant history to the appeal can be summarised as follows. The appellant arrived in the UK on 17.8.12 and claimed asylum on entry. The Secretary of State refused her application on 3.5.13. First-tier Tribunal Judge Osborne heard the subsequent appeal on 12.7.13. In the decision promulgated on 31.7.13, Judge Osborne dismissed the appeal on all grounds. The judge accepted the age assessment of the appellant being over 20 years of age, finding that she had not been truthful about her age claim. The judge found that she was not trafficked to Italy for the purpose of prostitution, as claimed, but was an economic migrant who subsequently voluntarily worked as a prostitute. The judge did not accept that she had claimed asylum in Italy. The judge also found that she would not be at risk on return to Nigeria as a single parent female with a young child.

7. The appellant did not seek to appeal the decision of the First-tier Tribunal and became Appeal Rights Exhausted on 6.9.13. However, the appellant did not leave the UK and on 24.3.14 made further representations, which were accepted by the Secretary of State as a new claim. This was refused by a decision made on 16.6.14, together with removal directions. It was the appeal against this decision which came before Judge Coates on 29.9.14.

8. As Judge Coates noted at §27, in many respects the appellant's fresh claim was a repetition of the claim considered, refused and appeal dismissed in 2013. Following Devaseelan, Judge Coates correctly considered that previous decision as the starting point. It is not binding on the second Tribunal, but the second Tribunal is not hearing an appeal against it. Whilst each new application is to be decided on its own merits, it is generally to be regarded by the second Tribunal judge as an authoritative determination of the issues of fact that were before the first Tribunal. Generally, the second judge should not revisit findings of fact made by the first on the basis of evidence that was available to the appellant at the time of the first hearing. If issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather than allowing the matter to be relitigated.

9. I note that the appellant did not seek to appeal the decision of Judge Osborne. In Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC) the Tribunal held that the parties are bound by unappealed findings of fact in an immigration judge's decision. However, Upper Tribunal Judge Latter goes on that state that different considerations may apply when there is relevant fresh evidence

that was not available at the time of the hearing, or a change in circumstances, or new events.

10. Judge Coates had summarised the appellant's core claim, between §16 and §27 of the decision and went on to consider, as stated at §30, whether there is any new evidence or change in circumstances which would justify a different outcome. The judge considered the appellant's evidence. As there had been some change in circumstances, including the birth of her child on 16.10.12, the judge went on to consider those issues, including the appellant's mental health and in particular PTSD, and whether there was any risk on return for the appellant or her child returning to Nigeria, including the claim of risk of FGM. The judge concluded at §39 the appellant is not suffering from any significant mental illness and at §43 that there was no risk of serious harm for the appellant or her child on return to Nigeria.

11. In granting permission to appeal, Judge French considered it arguable that the First-tier Tribunal Judge erred in law by failing to consider the expert report of Abigail Stepnitz, the judge being under the mistaken impression that this report had been considered at the time of the earlier First-tier Tribunal decision.

12. It is correct that the judge was in error in the observation at §42 that the report of Abigail Stepnitz had been before the Tribunal at the first appeal hearing. As Judge French pointed out, the report is dated 21.2.14 and I can see from the preliminary passages that it was based on an assessment of the appellant on 3.2.14 and that the decision of Judge Osborne features in the list of materials considered. It follows that Judge Osborne could not have considered this report.

13. However, the decision asserts both at §8 and §42 that Judge Coates took the report of Ms Stepnitz into account, together with all other evidence submitted on the appellant's behalf. The erroneous observation that Judge Osborne had considered the report is neither here nor there, and thus not material, provided it has in fact been considered by Judge Coates.

14. It is not necessary for a judge to set out or summarise all the evidence placed before the Tribunal, although it must be clear that the judge has taken account of material matters and not taken account of immaterial matters.

15. The matter is complicated further by the fact that the Secretary of State accepted the new submissions as a fresh claim, taking into account, as is clear from §2 of the refusal decision, of the expert evidence of Ms Stepnitz.

16. The Rule 24 response of the Secretary of State, dated 25.11.14, asserts that Ms Stepnitz's report is clearly based on the assumption that the appellant's account is credible; it is accepted in its entirety in order to reach the conclusion that her account is both plausible and consistent with the experience of others.

17. Despite the Rule 24 response, Mr McVeety told his instructions are that the Secretary of State accepts that there has been an error of law. Because it had been accepted that the expert report was new evidence it should have been taken into account by Judge

Coates. However, neither that concession nor the reasoning for it can be binding on this Tribunal, though it might well be relevant to the fairness of the process leading to the second appeal dismissal.

18. Judge Osborne gave clear and cogent reasons for rejecting the appellant's factual account. After considering what is essentially the same factual trafficking claim in the context of all the evidence, Judge Coates also found that the appellant's overall credibility is poor, relying not only on the respondent's refusal letter and Judge Osborne's decision, but Judge Coates' own consideration of the evidence. At §30 Judge Coates stated that she had found nothing in any new evidence or change of circumstances to justify any different outcome.

19. However, perhaps because the judge mistakenly believed Judge Osborne had already considered the report of Ms Stepnitz, there was no overt consideration of that expert report in the decision or any of the matters in the report. It was new evidence not before Judge Osborne. Whilst matters of credibility are for the judge and not the expert, in the process of assessing credibility expert opinion as to plausibility and consistency with the experience of others is relevant to a judge's credibility assessment. Whilst it has been stated that all evidence and this report in particular has been taken into account, the decision of Judge Coates does not demonstrate any engagement with the expert report, or provide reasons for rejecting the expert opinion. I also find that it would be unfair for the appellant not have had the report taken into consideration and actively address when it was the basis on which the Secretary of State accepted the new representations as a fresh claim.

20. In the circumstances, I am persuaded that there is a material error of law in the decision of the First-tier Tribunal by failing to engage with the expert report such that it must be set aside and remade.

21. I have also considered the other grounds of appeal but, like Judge French, find that they have little merit and would in themselves have been insufficient to set aside the decision of Judge Coates.

22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The error of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

23. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial

fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision:

24. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to be made afresh in the First-tier Tribunal.

Signed: Date: 23 February 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

25. The appeal is to be listed for a fresh hearing before the First-tier Tribunal sitting at Stoke, with an estimate of 3 hours;

26. No findings of fact are preserved from the decision of Judge Coates;

27. The appeal should not be heard by Judge Osborne, Judge Coates, or, by reason of remarks made in the course of the error of law hearing, by Judge Pickup;

28. An interpreter in Pidgin English is required, to be female if possible.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed:  Date: 23 February 2015

Deputy Upper Tribunal Judge Pickup