Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/01261/2015**

AA/01263/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
On 29 September 2015	**Promulgated**
	On 20 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

HAA

ST

(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr E Waheed, of Counsel, instructed by Magna Solicitors
Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication

thereof shall directly or indirectly identify the original Appellants. This prohibition applies to, amongst others, all parties.

INTRODUCTION

1. These appeals have their origins in decisions made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 09 January 2015, whereby the claims of the Appellants for refugee status were refused. There were associated decisions to remove the Appellants from the United Kingdom. Their ensuing appeals to the First-tier Tribunal (the "*FtT*") were dismissed.

THE ASYLUM CLAIMS

2. The Appellants claim to be citizens of Bangladesh, mother and son respectively. The first Appellant, HAA, claims to have been born on 26th January 1989. The Secretary of State maintains that her date of birth is 03 January 1986. There is a third possible date of birth, namely 01 October 1988, which appears on a passport. The date of birth of the second Appellant, ST, is uncontroversial, being 24 October 2002. He is now aged 13 years.

3. The asylum claims were based on the mother's asserted fear that in the event of enforced return to Bangladesh she would be at risk of mistreatment by reason of having escaped from a people trafficker. She claimed to have given birth to her son when aged 13, having been raped. Some twelve years later both travelled to the United Kingdom by arrangement, accompanied by a male adult who organised the travel. Thereafter he forced the mother into sexual relations with him and others. There was also physical abuse. Both Appellants escaped through a window seven days later.

4. The first reason for refusal was based on the decision maker's assessment that the Appellant's professed name and date of birth were inconsistent with other information. Further, her assertion that she had not had her fingerprints taken was not considered credible. Her account of how she obtained a passport upon which she relied was also not considered credible. Next, it was noted that the professed date of birth of her son differed from that contained in an earlier visa application.

5. Inconsistencies in the Appellant's account of events in the United Kingdom were also highlighted. Her explanation for declining the opportunity offered to her of reporting her treatment to the police and making a trafficking claim were treated with scepticism. The several differing dates which she provided regarding arrival in the United Kingdom were highlighted. Her claim that she had been held in captivity in the United Kingdom was rejected. Her evidence relating to her age and the age at which she became pregnant was considered unreliable. Her inconsistent statements that she was raped when unmarried and became pregnant following marriage were also noted. The decision maker's assessment was

that the second Appellant is not the biological son of the first Appellant. Her evidence concerning previous unsuccessful visa applications made by both of them was considered unreliable.

6. Fundamentally, the key elements of the Appellants' claims were rejected as untruthful or unreliable.

DECISION OF THE FtT

7. The FtT, in essence, endorsed the Secretary of State's decisions. The first Appellant's story was considered implausible in its entirety. The Judge, in reaching this omnibus conclusion, made a series of findings on discrete issues adverse to the Appellants. Significantly, one of these findings was that the first Appellant had failed to establish as a reasonable likelihood that she is the biological mother of the second Appellant.

8. Permission to appeal was granted on the express ground that the FtT's treatment of the DNA evidence had been procedurally unfair. The grant of permission is silent on the second ground, which complains that the adverse credibility findings are irrational.

CONSIDERATION AND CONCLUSIONS

9. I shall address firstly the procedural fairness ground, which forms the centrepiece of this appeal. It is based on an account, contained in the grounds of appeal, of what occurred at two separate stages of the first instance hearing. The author of the grounds is Counsel who represented the Appellant. The following are the relevant passages:

> "*At the outset of the hearing the IJ discussed preliminary issues. The original of the DNA report was shown and the IJ asked the Respondent's representative … if there was any issue with the DNA report so that she could narrow the issues.* [The Respondent's representative] *indicated that he didn't have any issues arising and the IJ gave an indication after looking at the original that it will be given due weight ….*
>
> [Later] *the Respondent made submissions and ….. made criticisms of the DNA report in terms of lack of information on the sampling …..*
>
> *I intervened and said that the hearing* [had] *proceeded on the basis that the report had no objections* [sic] *and an indication that the relationship was no longer an issue. If these objections were* [sic] *made at the outset with no indication given by the IJ then I could have led evidence on the issue and asked questions relating to the sampling which could have been part of oral evidence or asked for an adjournment as this was a material issue involving a child. I asked for an opportunity to re-examine the Appellant on the issues newly raised but was assured that this was unnecessary and that the DNA report will be given due weight (giving the impression that the report was satisfactory).*"

I juxtapose this account with the Secretary of State's Rule 24 Notice. The only notable aspect of this is the statement, in terms, that the presenting officer's "*Hearing Note*" is silent on this issue. The account contained in the grounds is not challenged in any meaningful way. I have also considered the submissions of the Secretary of State's representative at the hearing before me. While I have done so these, self evidently, were not capable of adding anything material to the Rule 24 response. Counsel's account is in essence uncontested and I have no reason for not accepting it. I shall, therefore, decide the appeal on this basis.

10. In [34] of the FtT's decision one finds the following passage:

> "*As for the DNA report,* [the presenting officer] *relies on the absence from the report of the continuity trail of the samples. The accompanying information which is usually attached to such reports regarding the samples and identification process* [is missing ??]*. As such, he submits, there is no proof that the sample said to be from the Appellant is in fact from her. He asks that I make an adverse credibility finding against the Appellant with the result that I cannot rely upon the Appellant's account as to the truth of what she claims without more.*"

Next, the Judge recorded the submission of Counsel for the Appellants to the effect that –

> "*… the DNA Report is sufficient evidence to prove maternity in this case given that the report states the samples arrived together.*"

In a later passage the Judge makes the following assessment of the DNA report:

> "[It] …. *describes the two samples as mouth swabs. The report does not state from whom or where the mouth swabs were received and it does not attach any documentary evidence as to the taking of the samples or any identification seen at the time the samples were taken …*
>
> [The Consent Form] *has not been provided to me and I was not told whether it was in the Appellant's possession.*"

Next, the Judge quotes from the conclusion of the report, namely that it is –

> "*… 20450 times more likely that the alleged mother is the biological mother of the child with a probability of maternity of 99.998%.*"

The Judge then noted the *caveat* in the report:

"If there is a possibility that a close relative of the alleged mother may be the biological mother of the child this may invalidate the results of this test."

11. In order to determine this issue it is necessary to reproduce the following passages from the decision of the FtT in full:

"53. I have to consider whether it is reasonably likely that the core of the Appellant's claim is true. I bear in mind that this is a low threshold for the Appellant to meet.

54. On the face of it the DNA evidence is more than sufficient to cross this threshold on the issue of maternity. However, I share the Respondent's concern as to the absence from the DNA report of information as to the taking of the samples. It is my experience that such information is regularly included within the reports together with confirmation of the identification documents provided at the time the samples were taken and often photos of those from whom the samples are taken. The significance of the omission is clear, there is no evidence upon which I can be properly satisfied that the sample said to be from the Appellant is, in fact from her. This point, although raised in submissions was not put to the Appellant in cross-examination and as such, she did not have the chance to address it. I bear this in mind when considering the weight to be attached to this aspect of the case.

55. However, even if the evidence was sufficient to show the sample came from the Appellant, I have considered the caveat in the report which I have set out [48] in the light of the evidence that the Appellant's son's visa applications sets out his parents as being the same parents as the Appellant's. Although those were not named as her parents in her visa applications, it is not disputed that the names and details given in her son's applications are, indeed, those of her parents. This was an issue which troubled the Respondent. If it is the case that the Appellant may in fact be the sister of the child rather than the mother, then the caveat effectively 'invalidates' the result of the report and hence the report inevitably carries far less weight than it otherwise would.

56. I have also considered the report in the context of the significant discrepancies arising from the Appellant's date of birth ([46] above) and the fact that, at no time, has she claimed to have a date of birth which makes it chronologically possible for her to be the mother even on her own version of his age (and in fact particularly on her version). Whilst the Appellant has explained that date of birth is of little consequence in Bangladesh and she did not realise its significance in the United Kingdom, I do not find this to be adequate. If what she said is correct or, at least

> *the true explanation for her inability to be sure about her date of birth, I would expect her simply to say that she is not sure about it. However, in evidence before me she was adamant that her date of birth is 26 January 1989 which makes her 26 years old. If she is right, and if she was 12 at the time she gave birth (based on her consistent evidence of being 11 when she became pregnant), her son would be 14 and there is no evidential basis to conclude that this is reasonably likely to be the case.*
>
> *57. The evidence, taken together, paints a picture which is sufficiently inconsistent, confusing and incomplete as to force me to the conclusion that the Appellant has failed in her attempt to satisfy me that it is reasonably likely to be the case that she is the biological mother of the second Appellant and I do not find her to be so."*

The Judge's omnibus conclusion is expressed in [69] in these terms:

> "*Taken together, the Appellant is unable to satisfy me that there is reasonable degree of likelihood that the core of her claim is true. I have not found her to be the biological mother of the second Appellant for the reasons I have given. I cannot identify any aspect of the Appellant's claim about which the evidence is sufficiently clear and reliable as to make any positive findings of fact about her case or in her favour.*"

As [54] of the FtT's decision makes clear, the discrete issue concerned the form and composition of the DNA report and it was not canvassed with the first Appellant in cross examination. Thus no questions were put to her relating to the point of concern, namely where, when and in what circumstances the samples upon which the report was based had been provided by her and her son. Furthermore, it would appear that the issue concerning the availability of the consent form, which also troubled the Judge, was not ventilated at the hearing. The question to be addressed is whether, given these factors, the Appellants were denied their fundamental right to a fair hearing.

12. The governing principles were rehearsed *in extenso* in the decision of this Tribunal in MM (Unfairness: E&R) Sudan [2014] UKUT 105 (IAC) at [14] – [23]. Giving effect to these principles I conclude without hesitation that the hearing at first instance was unfair. The unfairness consisted of the ventilation in closing submissions of an issue of unmistakable importance which had not been canvassed with the first Appellant in cross examination, coupled with the Judge's refusal to permit any form of modest case management adjustment, such as a short adjournment, which could have redressed the balance. The materiality of this unfairness is beyond plausible dispute, given that the issue features so prominently in the decision of the FtT and forms one of the cornerstones for dismissing the appeal. In this context it matters not that the FtT had other reasons for reaching this conclusion. A manifest error of law is demonstrated in consequence.

13. There are two further troubling features of the decision of the FtT. First, while the Judge appears to recognise, in [47], that samples were properly provided in the conventional way, this issue is not revisited in the critical passages of the decision and no finding thereon is made. Second, there is a clear and significant error in the Judge's understanding of the *caveat* expressed in the DNA report, noted in [10] above. This caveat adverted to the "*possibility that a close relative of the alleged mother may be the biological mother of the child*". The first observation which this invites is that this did not form part of either the Secretary of State's refusal decisions or the case made by the Secretary of State's representative at the hearing. As a result, this issue was not raised. Second, relying on this passage, the Judge appears to have formed the view that the first Appellant may be the sister of the second Appellant. This was clearly influential in the Judge's reasoning and conclusions. However, there are two difficulties here. The first is the procedural unfairness already noted. The second is the Judge's failure to make any clear finding about this issue. These further shortcomings in the FtT's decision may be viewed as fortifying my conclusion on the first ground or constituting free standing errors of law.

14. The second ground of appeal is an irrationality challenge. As I have observed, the grant of permission is silent in relation to this ground. While this is regrettable, the appeal proceeded on the basis that this is a permitted ground. I consider the specifics of this challenge, rehearsed in [12] – [14] of the grounds of appeal, to be lacking in merit. They involve isolating certain parts of the decision and divorcing them from their full context. They ignore the assessment, findings and conclusions which surround them. I conclude that they have no substance. However, there is one discrete aspect of this ground which escapes this critique, namely, the complaint that the FtT evidently failed to take into account the evidence of "…. *the independent witness who speaks the Appellant's language* [who] *stated that ST is her son ….*": [15]. This ground is made out and, in my view, cannot be dismissed as something so minor or peripheral as to be immaterial.

15. Finally, it is appropriate to draw attention to the decision of this Tribunal in BW (Witness Statements by Advocates) Afghanistan [2014] UKUT 00568 (IAC). While Counsel who represented the Appellants at first instance, properly, did not conduct the appeals, I consider that the account of the conduct of the hearing should have been contained in a witness statement. It will rarely, if ever, be appropriate for grounds of appeal to be couched in the first person in the way in which they were composed in this case.

DECISION

16. On the grounds and for the reasons elaborated above the appeals are allowed. As the Appellants were denied a fair hearing remittal to a

differently constituted FtT is the appropriate course. It is not appropriate to preserve any of the FtT's findings.

Signed: Dated: 20 May 2016

Deputy Upper Tribunal Judge Bagral