**Upper Tier Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/09170/2014

**THE IMMIGRATION ACTS**

| **Heard at Birmingham** | **Decision Promulgated** |
|---|---|
| **On 31 March 2016** | **On 13 April 2016** |

**Before**

**Deputy Upper Tribunal Judge Pickup**
**Between**

**RK**
**[Anonymity direction made]**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the appellant: Ms R Evans, instructed by WTB Solicitors
For the respondent: Ms R Petterson, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is Ms RK's appeal against the decision of First-tier Tribunal Judge Manuel promulgated 27.3.15, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 7.10.14, to refuse her asylum, humanitarian protection and human rights claims.

2. First-tier Tribunal Judge Osborne granted permission to appeal on 22.4.15.

3. Thus the matter came before me on 31.3.16 as an appeal in the Upper Tribunal.

**Error of Law**

4. I find such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Manuel to be set aside and remitted to the First-tier Tribunal to be remade afresh, in accordance with the attached directions. Having announced that decision at the error of law appeal hearing, I reserved my reasons, which I now give.

5. The relevant background can be summarised briefly as follows. The appellant, a national of the Democratic Republic of Congo (DRC) claims that in 2011 she became a member of the UDPS, became an activist in charge of publicity and held meetings at her home. She was arrested and detained for 2 days in December 2011, and arrested and detained for 5 days in February 2012. On 31.12.13 she was at the airport in Kinshasa following an attempted coup. She was seen by a solider who had been involved in her detention in 2011 and as a result detained again on suspicion of being involved in the recent attack. She was taken to Makala prison, where she was tortured and raped on a number of occasions, accused of trying to overthrow the President. She escaped in May 2014 through the intervention of her uncle. In June 2014 a man who provided her with a passport took her to the airport. She flew to Kenya and then to the UK, arriving on 13.6.14. She claimed asylum on 20.6.14. At that time she had already conceived, being pregnant with twins, the father being CL, a British citizen she knew from the DRC and whom she met again in the UK. She fears that on return to DRC she would be arrested and killed by the government because she escaped from prison.

6. In summary, the grounds assert that the First-tier Tribunal Judge failed to attach appropriate weight to the asylum interview record in favour of the appellant's witness statement; erred in drawing conclusions as to the expected behaviour of a rape victim; made an adverse credibility finding against a victim of sexual assault due to an absence of psychological evidence of trauma, raising a disturbing and unlawful precedent; erred in her assessment of credibility and relied on a misunderstanding of the country evidence relating to the appellant's account to find that the incident of 23.12.11 did not take place; failed to take into account the fact that the appellant's account is corroborated by the objective evidence in the bundle; made a finding at §49 that it is not credible that the appellant would have been able to leave the airport in Kinshasa which is unsupported by any country evidence; Relied at §58 on an apparent discrepancy in the appellant's evidence which was not put to the appellant at the hearing; and erred in relying on this last point without giving the appellant the opportunity to explain.

7. In granting permission to appeal, Judge Osborne found that in any otherwise careful and well-reasoned decision, "it is nonetheless arguable that the Judge erred in relying on the absence of medical evidence of the psychological effect upon the appellant of the repeated rapes. It is arguable that the judge erred in making an adverse credibility finding against the appellant on the basis of a lack of expert psychological evidence following the appellant's failure to seek counselling. It is further arguable that the judge erred in failing to take account of the fact that the

appellant's account of the incident on 23.12.11 is corroborated by the objective evidence in the appellant's bundle."

8. At §50 the judge addressed contradictions by the appellant as to how many times she was raped in detention. She was asked in evidence about the psychological impact on her, and said that she had suffered some memory loss but had received no counselling and no medical treatment other than for a skin rash. At §53 the judge notes that the CMR record states that the appellant intended to provide medical evidence, but that no such evidence has been adduced. The Judge continued, "It is reasonable to expect that a victim of repeated rape whilst in detention would suffer psychologically. The absence of any medical evidence together with the contradictory evidence regarding the number of times the appellant claims she was raped leads me to disbelieve her account regarding arrest on 31 December 2013 and detention until May 2014. It follows that I also do not believe the appellant's account regarding escape from prison."

9. It is clear from the above that although it wasn't the only strand of evidence relied on, the judge's view on the absence of psychological evidence was crucial to the assessment of credibility of the rape claim, and pivotal to the credibility assessment of the appellant's account of arrest, detention and escape from custody.

10. The judge was factually wrong about the CMR record, which is in the case file before me and which states that there would be no medical evidence. Mr Evans confirms the appellant's representatives' case that at no time did they ever suggest they would produce medical evidence.

11. More significantly the judge appears to have reached a conclusion that a person who has been raped must have suffered psychological damage and must therefore be able to produce expert evidence to that effect, or at least to demonstrate that she has had counselling. This is an entirely subjective opinion made without evidential support that is irrational and cannot be objectively sustained. There may or may not have been psychological trauma, and the appellant may or may not have been offered or declined counselling or psychological therapy. That she has not produced any evidence of such cannot in and of itself render her claim not credible.

12. The comments at §54 are also disturbing. There the judge notes that the appellant did not become pregnant as consequence of repeated rape, but yet conceived twins within a week of her arrival in the UK. At §55 the judge recorded that the appellant denied using contraception. Apparently, this followed cross-examination as to whether she had been taking contraceptive pills at the time she was detained and raped, which she said she was not. She was only asked about medication and not asked about other forms of contraception. The judge appears to rely on a conclusion that the appellant could not have been raped because she did not become pregnant when not using contraception. This conclusion is very obviously flawed and in error of law.

13. These flawed findings so fundamentally underpin the remaining credibility findings that the decision as a whole cannot stand for this reason, regardless of the other grounds of appeal.

14. At §26 the judge addressed the ground of appeal that the asylum interview was not recorded and a request at interview, repeated in two written requests, for a gender preference of interviewer was not complied with. The judge acknowledges that the appellant's representatives wrote to the home office on 9.7.14 and again on 15.9.14 requesting a female interviewer. However, the judge was in factual error in stating "it is not correct to state that the appellant had requested a female interviewer and interpreter at the time she claimed asylum," as asserted in the skeleton argument. The judge relied to the letter of 9.7.14 which indicates that their client was asked for preferences at the time of her screening interview and stated she has none. However, we understand that our client has been a victim of sexual assault and she does in fact prefer to be interviewed with only women present." The judge has misunderstood the facts. It is recorded at A13 of the respondent's bundle that when she made an appointment for her asylum application she requested a female interpreter, however, she confirmed she was content to be interviewed by a male. The letter of 9.7.14 explained that she had not felt confident enough to maintain her earlier request when asked in person if she was happy to be interviewed by a male person. Within a few days of that screening interview the request was made in writing. In the circumstances, given the factual error, and the failure to comply with the request for female interviewer and interpreter, the judge has failed to adequately address the ground of appeal that less weight should be given to the interview answers than her witness statement. It remains arguable that the Secretary of State failed to comply with her own policy guidance on this issue, to the prejudice of the appellant.

15. There are a number of other, more minor, errors in the decision attacked in the grounds of appeal.

16. For example, between §33 to §40 the judge addressed the 2011 incident and background evidence that the alternative swearing in ceremony of the opposition leader was held at his home, when the appellant stated that swearing in ceremony was supposed to take place at the martyr stadium and only found out afterwards that this was a strategy by the UDPS. The background evidence, as recorded by the judge at §38, is that supporters and officials of the UDPS gathered at the opposition leader's home. The judge concluded that if the appellant was an active member of the party it is reasonable to expect that she would have been one of the members present at the house instead of attending the stadium. However, it is clear from the background information that there was a plan, circulated as a ruse, to hold the swearing in ceremony at the stadium. In response to that information the background information confirms that crowds of UDPS supporters attended rallies held at the stadium to celebrate the event and that the authorities were engaged in dispersing these supporters. It was never claimed that the appellant was part of the UDPS leadership, or a person with such a role or rank as to be privy to the secret plan to hold the event at his home instead of at the stadium in order to deceive the authorities. Many other UDPS supporters did the same as the appellant, apparently

also unaware of the ruse. In the circumstances, to hold this against the appellant was unfair and unjustified. The judge also holds against the appellant at §39 that she did not mention this strategy at the time of her interview. However, she was not asked about it or what happened after the incident.

17. Similarly, at §58 the judge claims that at §36 of her witness statement the appellant stated that she got to know CL, the father of her twins, "a little bit" before she came to the UK because she had telephone contact and met him a year ago in the DRC. The judge contrasted this interpretation of her statement with the evidence of CL, who said he had last spoken with the appellant in 2011 and had not been back to the DRC since 2001. In fact what the appellant said about meeting CL was "I met him year ago in DRC also" with the 's' missing in a typo from what was obviously meant to be "years ago," meaning she had also met him years ago in the DRC. The difficulty is that this supposed discrepancy was not put to the appellant at the appeal hearing and she was not given the opportunity to address it.

18. In her submissions, Ms Petterson resisted some of the grounds of appeal, including the issue of the failure to provide a female interviewer, as not material to the outcome of the appeal. However, she conceded that there were clear errors in relation to the judge's unsustainably subjective views as to how a rape victim would behave, and whether the absence of expert evidence of psychological trauma or of counselling could properly undermine the credibility of the claim, as outlined above. Thus Ms Petterson did not resist the setting aside of the decision and agreed that it should be remitted to the First-tier Tribunal to be heard again.

19. 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. The errors 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.

20. In all the circumstances, at the invitation and request of both parties to 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.

**Conclusions:**

21. 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 set aside the decision.

I remit the making of the decision in the appeal to the First-tier Tribunal in accordance with the attached directions.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

Deputy Upper Tribunal Judge Pickup

**Consequential Directions**

1. The appeal is remitted to the First-tier Tribunal sitting at Manchester, with an estimated length of hearing of 3 hours;

2. The appeal is to be heard with an all-female court;

3. The appeal may be heard by any female judge, except Judge Manuel;

4. The appeal is to be remade afresh with no findings preserved;

5. It is anticipated that there will be two witnesses including the appellant;

6. An interpreter in French (African) will be required;

7. Not later than 10 working days before the appeal hearing date notified by the tribunal, the appellant must serve on the respondent and lodge with the Tribunal a two copies of a single consolidated bundle, indexed and paginated, comprising all objective and subject material to be relied on, together with any skeleton argument or case authorities. The appellant cannot assume that any previously submitted materials have been retained. The Tribunal will not accept documents submitted on the day of the hearing.

**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.

However, given the circumstances, I make an 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.

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**

**Deputy Upper Tribunal Judge Pickup**

**Dated**