Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03066/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 April 2019	**On 24th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

BB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bandegani of counsel, instructed by Duncan Lewis and Co
For the Respondent: Ms Willocks-Briscoe, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a Mongolian national born on the 14 August 1970. She appeals to the Upper Tribunal (UT) against the decision of the First-tier Tribunal (FTT) on 7 February 2019 to dismiss her appeal against the respondent's decision dated 19 February 2018 to refuse her asylum/claim for humanitarian protection and/or under the European Convention on Human Rights (ECHR).

2. She claimed to have been abused by her partner, [B]. Indeed, she claims to have been tortured by [B] in the past. The appellant claimed before the FTT that she would come to the attention of [B] if she returned to Mongolia. She also claimed that she would fear persecution for her political opinions if she returned to Mongolia. The appellant claimed she would be contacted by Mr [B]. She would be incarcerated and face further torture and ultimately may be killed.

3. The current appeal is against the decision of First-tier Tribunal Judge Andrew (the judge) in the FTT to dismiss her asylum and human rights claims on 7 February 2019.Permission to appeal was given by Judge of the First-tier Blundell, who was satisfied that it was arguable that the judge had erred in failing to put the appellant on notice of matters which ultimately resulted in adverse credibility findings following the hearing in the FTT, for example, at paragraph 34 et seq., where she had made a number of findings about her husband's political connections. Secondly, Judge Blundell thought the judge may have "inverted the standard of proof" by reference to a case called **AZ (Iran) [2018] UKUT 245 (IAC)**. He found a number of points "less meritorious" and indeed some of the points "marginal at best". Judge Blundell nevertheless decided to give permission to appeal all points despite the "prolixity of the grounds".

The hearing

4. At the hearing I heard submissions by both representatives. The appellant's representative submitted that there were favourable findings by the judge but the key issue she should have addressed was risk on return. The respondent had been unrepresented at the tribunal below, which lasted only 12 minutes. The judge was criticised for putting no questions to the appellant or her representative. It was submitted that the hearing had been unfair, not so much because of anything said or done but because the appellant was not given an opportunity to address new matters, which clearly concerned the judge as became clear when they were subsequently dealt with in her decision. The judge was also criticised for "inverting the standard of proof" (ground 1 of the grounds advanced before the UT). It was suggested that in paragraph 38 the judge had gone "off-piste" by making assumptions about her medical condition (in relation to her left buttock). She could have asked the appellant whether there was another explanation in relation to the ailment concerned but had not done so. At paragraph 39, the judge had made her own medical assumptions about the appellant's medical condition which had not been justified on the evidence. I was referred to the appellant's expert report at G89 where, it was submitted, the expert had given a balanced explanation for the conclusion in his report which was to the effect that the appellant's condition was consistent with her account. That account suggested that the appellant was a "vulnerable witness" who should have been treated in that way by the judge. Next it was submitted that the judge had inverted the standard of

proof at 22, 24,25 and 44 of the decision where she had dealt with the relationship between the appellant and her husband, her property rights consequence on that relationship, certain credibility issues connected to that relationship. The judge also dealt with the extent to which she would be able to cover up her injuries.

5. The respondent submitted that the case of **WN (DRC) [2004] UKIAT 00213, [2005] INLR 340 (WN)** where the Immigration Appeal Tribunal had made a number of key points at paragraphs 25-29 and 31-40. The guidance in and in **Maheshwaran v SSHD [2002] EWCA Civ 173** was also noted and, Ms Willocks-Briscoe said, had to be followed. The case of **WN** considered the so-called "Surendran guidelines". In the **Surendran** case it was said that, particularly where the respondent was unrepresented, care was needed in the type of questions put to the appellant to ensure he had an opportunity to put his own case and was treated fairly. Any doubts in the adjudicator's mind should have been put to the appellant. If an adjudicator/judge, is to make negative credibility findings, he must first put his credibility concerns to the appellant to give the latter an opportunity to comment. The object of these guidelines was to ensure a fair hearing and to prevent circumstances arising where it could be said that there was a real possibility that the adjudicator was biased.

6. As I pointed out at the hearing, certain advantages relate to an appellant not having to be cross-examined in cases such as this one, where the respondent had not been represented before the FTT. Ms Willocks-Briscoe also relied on **Secretary of State for the Home Department v Balasingham Maheswaran [2002] EWCA Civ 173** particularly the following passage in paragraph 5, where the Court of Appeal said that:

> "Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that "least said, soonest mended" and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

7. Ms Willocks-Briscoe said it was unnecessary to put every point of possible adverse credit to an appellant. It was accepted, however,

that it was good practice to alert the appellant to any adverse credit points that concerned the tribunal. Here the FTT had completely rejected the appellant's account of having been under the influence of one [B]. The appellant was well aware of the issues before the tribunal but decided to give the answer concerned.

8. Mr Willocks- Briscoe also relied on the **VW (Sri Lanka) [2013] EWCA Civ 522**. And on the **Semu v Secretary of State for Home Department [2006] EWCA Civ 1153** which also dealt with the correct approach to consideration of evidence in a case of this type. In the last-mentioned case, the Court of Appeal found no error of law in a case where the adjudicator had considered all the evidence including medical evidence which tended to undermine the appellant's case. Ms Willocks-Briscoe submitted that it was not necessary to put all credibility points to a witness, that the judge can put the concerns to the witness in a particular way relevant to the case in hand and since the appellant was represented she had a full opportunity to put her case. If there were inconsistencies in the evidence the judge was quite entitled to draw attention to these and to dismiss her appeal against the refusal of her claim on that basis. In terms of fairness, the judge's decision could not be faulted. She gave clear reasons for her decision. The judge had to grapple with the issues, and she did so. She had to weigh up the evidence make credibility findings, and this is what she did. The country evidence was also considered by Ms Willocks-Briscoe. She produced a Home Office asylum policy instruction on medico-legal reports, such as the one from the Helen Bamber foundation. She accepted this was a reputable organisation and that no report should be given little weight on the ground that the writer was a GP as opposed to a consultant (apparently the case here). Nevertheless, the judge, not the medical expert, was there to judge the credibility of the appellant's account. The diagnosis of PTSD/depression was "consistent" with other causes and there was no reversal of the burden of proving the appellant's case. The Istanbul protocol had to be followed.

9. Mr Bendagani responded by saying fairness is the heart of the process and if there was any failure to this minimum level of fairness then I should interfere with the decision. Home Office guidance recognises the expertise of the medical expert. The medical evidence here had broadly supported the appellant's case. If there were any problems with the medical report they should have been drawn to the appellant's attention.

10. At the end of the hearing I reserved my decision.

Discussion

11. There were several strands to the appellant's claim, including her former marriage to NS and the rape and ill-treatment at the hands of

[B]. She produced evidence at the hearing before the FTT to confirm that her condition of depression and PTSD was broadly consistent with the account she had given. The threat from influential people made internal relocation impossible, she said, but the judge appears to have made no express finding on that point. She claimed to fear these influential people and on that basis could rely on the Refugee Convention on the basis that she had an imputed political opinion.

12. The judge was far from satisfied as to the credibility of the appellant's account, pointing out a number of inconsistencies. Additionally, the judge considered that if the appellant did have a legitimate asylum claim she would have come to the UK as soon as possible and advanced it soon after her arrival the UK in March or April 2011. A person who truly feared for their personal safety, would leave the country because of the risk of persecution. The judge believed that the appellant would receive some benefit from the fact that her son had carried out military service in Mongolia. It was her clear view that the appellant had not established a well-founded fear of persecution and she attributed her PTSD to her anxiety over a possible return to Mongolia. She noted that the appellant's account of the assaults by [B] were only supported by the appellant's own assertions and therefore she could not be satisfied, even to the low standard which applied, that they actually took place. The judge appears to make her own assessment of the appellant's medical condition and prognosis, speculating that the dermatitis on the appellant's left buttock may have been due to another reason. Nevertheless, given her rejection of the veracity of the appellant's claim, it is questionable whether the medical evidence would have tipped the balance in the appellant's favour even if the judge had considered it in much greater detail.

13. The issues before the UT are therefore as follows:

    (i) Whether the judge erred in her approach to the hearing so as to make the hearing material unfair by:

        (a) not asking questions of the appellant that should have been asked; or

        (b) failing to put concerns she had credibility of the appellant's account generally, so as to give the appellant a proper opportunity to comment?

    (ii) Whether the judge had erred in her treatment of the standard of proof?

    (iii) Whether such errors as have been established were material to the outcome in the sense that if the appellant was a victim of domestic violence or abuse was she at real risk on return to Mongolia?

    (iv) If so, what steps should be UT take to correct that material error of law?

14. I will deal with these issues in turn.

(i) Was the hearing fair?

15. It is said on behalf the appellant that care was needed, in the absence of the respondent's representative at the hearing. The hearing lasted for only 12 minutes and, according to paragraph 8 of the grounds of appeal, the judge asked no questions of the appellant. It is also said that the judge, far from adopting an interventionist approach, was too passive in her conduct of the case and she should have routed out the concerns expressed by the respondent which may have helped her address some of her adverse assessment of the appellant's credibility, which subsequently formed part of her findings. This was particularly the case in the absence of a representative on behalf the respondent. The judge is said to have acted contrary to the guidance given by Lord Reed in the Court of Session in **HA and TD v SSHD [2010] CSIH 28** (at paragraph 14).

16. I have carefully considered the failure to follow the Surendran guidelines arguments but have rejected them. The assertion that a judge has acted unfairly in his conduct of a hearing should only be made on proper grounds. Breaches of the Surendran guidelines are sometimes alleged but rarely succeed, as is clear from the authorities to which I was referred. The thrust of the authorities is to the effect that circumstances may arise where a judge is expected to take a more prominent role than would otherwise be the case. An example of such a case is where the respondent is unrepresented at the hearing. However, the judge here had to tread a careful line between adopting the roll of the respondent in cross-examining the appellant about her case and ensuring that all the facts were placed before the tribunal. There was clearly a danger that the judge would be too interventionist as opposed to adopting an overly passive roll.

17. Here I am satisfied the judge had a substantial bundle of documents, oral argument by the appellant's representative and she considered fully the detailed contents of the refusal letter. The judge was entitled to look critically at the evidence, and whilst some of the observations seem questionable, her overall conclusions on credibility were sustainable in the light of the evidence she considered. I am therefore not persuaded this ground is a valid one.

(ii) Did the judge err in her application of the standard of proof?

18. This is not a ground of appeal raised in the grounds and it was not pursued with any vigour at the hearing before the UT. However, since it is raised by Judge Blundell at paragraph 4 of the grant of permission, it is necessary to deal with this ground.

19. The judge referred to the correct burden and standard of proof at paragraph 13 of her decision. Read in context, the reference the

words “reasonably likely” in paragraph 22 does not indicate a failure to keep in mind the burden rested on the appellant to prove her claim a low standard. The judge was simply looking critically at the evidence as she was entitled to do. I can find no inversion of the standard of proof in the paragraphs referred to by Judge Blundell but if any of those paragraphs could have been more felicitously put I am satisfied that the overall conclusions were not infected by a mistaken application of the standard of proof.

(iii) Did the judge’s errors, if established, amount to material errors of law?

20. There was credible evidence in the form of the report from the appellant’s medical expert G 89 (Dr Silvana Unigwe) that the appellant suffered from significant depression, anxiety and PTSD. Dr Unigwe’s diagnosis was that the appellant’s PTSD and other conditions were “consistent with…” “the themes” and discrepancies and the possibility of invention were regarded as “unlikely” by the doctor. It was also controversial for the judge to say (in paragraph 39) that the diagnosed condition may have been due to her anxiety to stay in the UK.

21. In the circumstances the judge appears to have been over dismissive of Dr Unigwe’s report, describing to paragraph 37 as “not assisting” her and going on to make an assessment of certain aspects of the medical evidence supported by Dr Unigwe’s report. Nevertheless, as Ms Willocks-Briscoe submitted, ultimately credibility issues and the degree of weight a judge attaches to a particular piece of evidence, is not something that normally concern an appeal tribunal. Overall, I am satisfied that although the medical evidence was objective and credible, it did not necessarily overshadow all the other evidence and particularly evidence from the appellant herself. The judge rejected that evidence, assessing the credibility of the evidence negatively. There were a large number of adverse credibility findings, including a lack of plausible explanation for her departure from Mongolia and subsequent delay in advancing the asylum, human rights and protection claims in the UK. The judge was entitled to make adverse findings of credibility under the Asylum (Treatment of Claimants) Act 2004.

22. Overall, I am not persuaded the judge’s failure to properly analyse the medical evidence led to an incorrect conclusion. She rejected the appellant’s case, and even if greater weight were given to the medical evidence, it seems unlikely it would tip the balance in the appellant’s favour.

23. As far as the materiality of the errors identified are concerned, the judge made a clear finding that the appellant would not be at risk on return. I note that the respondent gave detailed reasons for her conclusion that the appellant would not be at risk and perhaps judge

should have considered these reasons more fully. Nevertheless, it was a finding open to the judge on the evidence.

24. I note that even the appellant had established she was at risk in her home area, there were, and presumably are, substantial reasons for considering there was a reasonable internal relocation option open to her, as was explained by the respondent in her refusal letter.

(iv) Assuming the above is established, how should this matter be disposed of?

25. Given the findings above, it is unnecessary to consider the means of disposal as they do not arise.

Conclusions

26. Overall, the judge had a substantial body of evidence before her, argument by the appellant's representative and a detailed refusal letter. The judge was entitled to look critically at the entirety of the evidence. I have concluded that she did not err in her application of the **Surendran** guidelines or overall in her conclusions, materially err in law.

Notice of Decision

The appellant's appeal to the UT is dismissed.

Decision of the FTT stands. The appeal against the respondent's decision to refuse the appellant's claim is dismissed on asylum and human rights grounds to the FTT was correctly dismissed by the FTT. The claim to humanitarian protection was also correctly dismissed.

Direction Regarding Anonymity – rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Anonymity direction was made by the FTT and in the absence of any representations, I have decided to continue that direction. Therefore, from now on the appellant they referred to as BB. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 18 July 2019

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 18 July 2019

Deputy Upper Tribunal Judge Hanbury