



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/03336/2018

THE IMMIGRATION ACTS

**Heard at Birmingham
On 29 August 2019**

**Decision & Reason Promulgated
On 5 September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**FP
ANONYMITY DIRECTION MADE**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Uddin, Counsel

For the respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. 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 Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because this decision refers to her asylum claim and sensitive medical evidence concerning her.
2. The appellant has appealed against a decision made by First-tier Tribunal ('FTT') Judge O'Brien, sent on 26 April 2018 in which her appeal on protection and human rights grounds was dismissed.

Background

3. Judge O'Brien took into account a medico-legal report dated 24 February 2017, prepared by Dr Clark. This is a detailed and comprehensive report which concludes that the appellant's PTSD and depressive symptoms *as well as* her scarring, are consistent with her claimed detention and torture in Cameroon, prior to coming to the UK in 2014.
4. At [41], Judge O'Brien accepted Dr Clark's "*physical observations and psychological diagnosis*" of the appellant but described her report as "*far from determinative of the appellant's account of the latter events in Cameroon*". In so finding, Judge O'Brien observed that Dr Clark failed to take into account the possibility that the appellant's scars may have been caused during her first period of detention in 2012, and not as claimed by the appellant during her second period of detention in 2014. Judge O'Brien observed that when the appellant's asylum claim was first considered by FTT Judge Jerromes, in a decision dated 18 April 2016 (and therefore before Dr Clark's report), the appellant's claim to have been detained and tortured in 2012 was accepted, but subsequent claimed events leading to a claimed 2014 detention were not. Judge O'Brien also noted that Dr Clark failed to consider whether the scars were caused during the appellant's childhood when she reported beatings by a relative. Judge O'Brien did not accept that the appellant's injuries were caused in the manner claimed, found her evidence relevant to the 2014 detention to be unreliable and dismissed the appeal on all grounds.
5. The appellant sought permission to appeal against Judge O'Brien's decision in wide-ranging grounds of appeal, that mostly focus upon the approach to Dr Clarke's evidence and the appellant's vulnerability in the light of it. The FTT and Upper Tribunal ('UT') both refused to grant the appellant permission to appeal.
6. In a decision dated 13 March 2019, HHJ Worster, sitting as a High Court Judge, granted the appellant permission to challenge the UT's refusal to grant permission to appeal, by way of judicial review. The matter now comes before me to determine whether Judge O'Brien's decision contains an error of law, as identified in the grounds of appeal.

Vulnerable witness

7. At the beginning of the hearing before me, the parties agreed with me that the appellant should be treated as a vulnerable appellant in accordance with the Joint Presidential Guidance Note No 2 of 2010 ('the Guidance'). Judge O'Brien accepted Dr Clark's diagnosis of PTSD and depressive symptoms.

SSHD's concession

8. I did not need to hear from Mr Uddin because Mr Mills conceded there was an error of law in the FTT's decision, such that it needs to be remade entirely. The appellant should have been treated as a vulnerable appellant by the FTT. The failure to do so expressly meant that the FTT failed to apply the Guidance when assessing the appellant's evidence, and failed to make credibility findings with the Guidance in mind. The FTT failed to properly address the detailed evidence in Dr Clark's carefully prepared medical report regarding the appellant's mental health, and its credibility assessment contained errors of law as a result.

Legal framework

9. In AM (Afghanistan) v SSHD [2017] EWCA Civ 1123, Sir Ernest Ryder, the Senior President of Tribunals, considered an appeal involving a young man from Afghanistan with a claimed traumatic history. In AM's case the psychologist offered advice as to how AM could obtain effective access to justice given his psychological difficulties. It was agreed before the Court of Appeal that insufficient steps had been taken to ensure that the proceedings were fair. Ryder LJ said this in AM (my emphasis):

"30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.

31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

- a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing

through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);

b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);

c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);

d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and

e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

10. At [33] Ryder LJ observed that the emphasis on the determination of credibility in an asylum appeal is such that there is particular force in the Guidance at [13] to [15], which states as follows:

"13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.

14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which by mental, psychological or emotional trauma or disability; the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

Error of law

11. As set out above, Mr Mills was correct to make the concession he did. Given that the respondent agrees that the decision must be set aside and remitted to the FTT, I can set out my reasoning briefly. However

it is important to set out this out so that hopefully lessons can be learnt. I recognise the FTT's decision is carefully drafted and makes wide ranging adverse credibility findings as well as endorsing the adverse findings made by Judge Jerromes. It is not necessary for me to address each of the grounds of appeal regarding the credibility findings or indeed the other findings made by the FTT, because there has been such a fundamental error of approach to the approach to the appellant's vulnerability and the observations in relation to it in Dr Clarke's report, that the entire decision must be set aside.

12. Judge O'Brien failed to take into account the matters set out below.
 - (i) The medical evidence pointed in one direction: the appellant should have been treated as a vulnerable appellant. After, all the rule 35 report led to the appellant's release from immigration detention for the reasons set out in the Home Office's summary dated 6 January 2017 and Judge O'Brien accepted Dr Clarke's psychological diagnosis.
 - (ii) The failure to do so meant that Judge O'Brien failed to apply the Guidance when assessing the evidence, and therefore failed to take account of the importance of the matters set out at 10.3, 14 and 15 of the Guidance (see above). Failure to follow the Guidance in a case such as this constitutes an error of law.
 - (iii) Judge O'Brien failed to properly address the detailed evidence in Dr Clarke's carefully prepared report, when making adverse credibility findings and in rejecting her account of the events surrounding the 2014 detention. This evidence includes, inter alia at [6.5] of the report: the multiple layers of trauma and the likely multi-factorial PTSD; the timeline for the commencement of trauma symptoms after the second detention; a reasoned conclusion that the PTSD is particularly related to detention and ill-treatment in Cameroon.
 - (iv) When addressing the genuineness of the appellant's fears, Judge O'Brien also failed to address Dr Clarke's opinion at [6.7] that her fears of ill-treatment in Cameroon is a "*major stressor and therefore appears a predominant factor exacerbating psychological symptoms*".
 - (v) Judge O'Brien failed to consider whether the discrepancies identified at [43 and 44] and [48] of the decision, might be explained by the appellant's PTSD, in the light of Dr Clarke's report, particularly at [6.10].

Conclusion

13. It follows that the criticisms in the grounds of appeal aimed at the FTT's approach to Dr Clarke's report and failure to properly apply the Guidance are made out. There are material errors of law in the decision of the FTT.

Disposal

14. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. This is because completely fresh findings of fact are necessary.

Decision

15. The decision of the FTT involved the making of a material error of law. Its decision cannot stand and is set aside.
16. The appeal shall be remade in the FTT de novo, by a judge other than Judge O'Brien.

Signed: *UTJ Plimmer*

Ms M. Plimmer
Judge of the Upper Tribunal

Date: 29 August 2019