



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/11215/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London

**Decision and Reasons
Promulgated**

On Tuesday 2 April 2019

On Friday 12 April 2019

Before

**MRS JUSTICE JEFFORD
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH**

Between

**MS
[ANONYMITY DIRECTION MADE]**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Walker, Counsel instructed by Turpin & Miller LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was not made by the First-tier Tribunal. However, as this appeal raises protection issues, it is appropriate to make an anonymity order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Lingam promulgated on 11 December 2018 (“the Decision”). By the Decision the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 8 February 2017 refusing his protection and human rights claims made in the context of a decision to deport him to Sierra Leone. The Judge dismissed the appeal on all grounds.
2. The Appellant has raised four grounds of appeal challenging the Decision. Those are in summary, that the Decision was procedurally unfair in relation to certain aspects of the credibility findings, that the Judge failed to provide adequate reasons for the credibility findings, that the hearing was procedurally unfair by reason of the Judge’s conduct and that the Judge did not provide sufficient reasons for upholding the certificate under section 72 Nationality, Immigration and Asylum Act 2002 (“the Section 72 Certificate”). We explore those in greater depth below.
3. Permission to appeal was granted by First-tier Tribunal Judge Pickup on 10 January 2019 in the following terms so far as relevant:

“...2. It is arguable that having agreed at the outset that the appellant and his sister would not be asked about their experience of alleged sexual abuse in Italy, it was procedurally unfair for the judge to make in the decision adverse credibility findings on the written evidence without indicating that this was an issue in question and enabling the concerns to be addressed at the hearing. In addition, it is arguable that the judge failed to act in accordance with the guidance in relation to assessing discrepancies in the evidence of vulnerable witnesses.

3. The other grounds have less merit and I am not persuaded there was an arguable impropriety in the conduct of the hearing in relation to questions asked by the judge and refusing to permit further examination in chief on issues not raised in previous evidence. However, all grounds may be argued.”

4. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Discussion and Conclusions

Ground three

5. We can deal very shortly with ground three on which we did not hear submissions. Miss Walker very properly accepted that, as Counsel who appeared below, if she wished to advance arguments based on what occurred at the First-tier Tribunal hearing, she would be obliged to cease to represent the Appellant as advocate before us in order that she could provide witness evidence. There was no statement from her as to what

occurred. In light of our decision on the other grounds, Miss Walker and Ms Cunha agreed that it was not necessary to deal with this ground and no point would be served by adjourning to allow Miss Walker to pursue it.

Ground one

6. As we also identified at the hearing, ground one (the procedural fairness ground) was, as Judge Pickup observed the most promising. Moreover, this may impact on the other grounds. Accordingly, we deal with this first.
7. We accept that, to some extent, this ground too turns on factual evidence as to what occurred at the First-tier Tribunal. However, there is no dispute about what happened, and we permitted Miss Walker to elaborate. She said that, prior to the hearing, she discussed with the Presenting Officer the issues which were likely to form the basis of his cross-examination. This is because part of the Appellant's case is that he was sexually abused during a period spent in Italy in the course of his journey to the UK. A psychiatric report produced on his behalf supported his story in that regard. The Presenting Officer confirmed that, so far as he was concerned, what had happened to the Appellant and his sister in Italy was not relevant. The issue was whether the Appellant would be at risk on return to Sierra Leone now. Miss Walker accepted that this was not a concession. However, at the outset of the hearing, she had explained that position to the Judge who said she was happy to proceed in that way. No questions were asked of either the Appellant or his sister about their journey from Nigeria (to which they first went from Sierra Leone) to the UK or what had happened to them in Italy.
8. However, at [49] to [53] of the Decision, the Judge said as follows:

"49. The following has raised considerable concerns for me. Both his sister (who gave oral evidence before me) and his mother (see her letter) allegation that his sister was enslaved on arrival in Italy and forced to work as a prostitute in Italy is not credible because his letter (F6) does not support the allegation. The appellant has not sought to address the obvious discrepancy in their accounts.

50. His letter (F6) contrary to his subsequent allegation states "... When she came to the UK to study she could not leave me there because I was underage and could not look after myself. So my sister and mother agreed for me to stay with her and my mother in the UK..." Hence his account is wholly different to the sister's account that a kind Samaritan intervened to help her 'escape' from her 'situation' and come to the UK. Therefore I place no weight on the account provided by his sister of the problems she faced prior to leaving Italy.

51. Subsequently and following the signing of his Deportation Order, the appellant (see his letters at I1-17 of RB) including his sister sought to further mislead that he was sexually and physically abused by a man had shared the property with them. I have come to draw that conclusion because even if his mother's letter does not mention his claimed experience; his earlier letter (F6) does not mention the allegation either. He claimed he had kept it a guarded secret (I4 of RB) and only told his victim [BA] who sought to 'blackmail' him with the information to

pressure him to commit crimes. Yet, court records confirm the violent attack on [BA] was over territorial disputes.

52. Perhaps more harmful to the appellant's credibility is his allegation that whilst he sought to share his 'secret' with someone he recently met, he never spoke about it to his sister who he regards as his 'mother' and shares a close relationship. On the other, his sister whilst allegedly suspecting he was being abused; had never acted on her suspicion even when his behaviour of criminality increased in the period from 2007 to 2012. Unless he has been concealing his criminal behaviour because the letters from his mother and sister speak infer he is of good character.

53. There is no truth to his allegation of sexual abuse because if it were true it is not credible that he would not have raised it as mitigating circumstances in his criminal trial which resulted in him serving a 12-year imprisonment sentence. And if not at his trial, he would have at least raised it as a ground to appeal against his lengthy imprisonment sentence. His explanation that he felt compelled to reveal his 'secret' now is another yet another lie he was aware as of Feb 2016 of the respondent's decision to deport him'; yet he had delayed such important fact until he was served with the deportation order. His timing to raise such allegation only further damages his credibility and the level he would go to avoid deportation."

9. We note that the Judge's reference to the abuse claim being relevant to mitigation in the Appellant's criminal trial arises because he says that it was because his victim was blackmailing him about the abuse that he attacked him.
10. The Judge goes on to refer to a submission made by Miss Walker inviting her to revisit the findings of the Competent Authority in relation to the trafficking claim. We accept that the Judge may have been entitled to have regard to that decision even though the parties had agreed that no cross-examination would take place about this aspect of the Appellant's account and none did take place. However, that was not the basis of the Judge's findings.
11. We accept Miss Walker's submissions that the way in which the Judge relied on this part of the Appellant's account has given rise to procedural unfairness in light of the way in which the case proceeded. As she pointed out, the Judge has found that the account and her findings on that part of the account damaged the credibility not only of the Appellant but also his sister. She has also gone so far as to say that this part of the account is entirely fabricated. As Miss Walker submitted, and we accept the procedural unfairness arises from the failure to give the Appellant the opportunity to address the issue of why he did not put forward this part of his case earlier and the reliance placed on inconsistencies in the evidence which were not put to the Appellant and his sister. The Judge has not considered why this account may not have been disclosed earlier; that is clearly relevant when the allegation is one of sexual abuse. Miss Walker said that the unfairness was material because the findings also impacted on the sister's evidence about the account of the family leaving Sierra Leone and their time spent in Italy and on what was

said in the Appellant's statement about the approach to sentence and on the expert report.

12. That latter point is particularly important because, at [55] of the Decision, the Judge "sets aside" the expert opinion in the medical evidence that the Appellant has been abused and is vulnerable, and does so solely on basis of the credibility findings which we have set out above. That in turn has affected the Judge's findings about the impact of the expert report on other aspects of the Appellant's case. That is also the answer to Ms Cunha's point that, although the passage at [49] to [53] of the Decision did disclose unfairness, it was nonetheless not material because that part of the Decision could be extracted and did not impact on the reasoning in relation to the remainder of the claim concerning risk on return which was also rejected on credibility grounds. She drew our attention to [29] to [48] of the Decision. We reject that submission however because if the Appellant's credibility had not been damaged in relation to the abuse allegation, then the expert report would have to be considered as to its effect on the Appellant's evidence, and the credibility findings in relation to the remainder of the account might not have been reached.
13. For those reasons, as we indicated at the hearing, we find there is a material error of law established on ground one.

Ground Two

14. As a result of our finding on ground one, we can take ground two more shortly. Miss Walker pointed out that the findings on the claim about what happened in Italy were directly relevant to what is said at [30] of the Decision about the Appellant's ability to speak Italian. She also pointed out that there is no inconsistency regarding the expert report as to the Appellant's mental state which the Judge would have realised if she had engaged with that report. We found less persuasive Miss Walker's submissions regarding the other credibility findings, in particular what is said about the core claim that the Appellant would be at risk on return to Sierra Leone due to his father's former position as a driver for important people. What is said at [46] of the Decision is reflective of the vagueness of the Appellant's account in this regard, including the answers in the asylum interview at questions [50] to [55]. The only factor which may be missing is reference to the possible reason why his father was targeted but given the overall lack of detail, a Judge would be entitled to make points such as those made at [46].
15. However, as we have already observed above, we cannot accept Ms Cunha's submission that the Judge's reasoning in relation to this core claim about what would happen on return can simply be left intact on the basis that the findings at [49] to [53] of the Decision can be omitted from consideration. As we have already noted, those impact in particular on the Judge's treatment of the medical evidence and whether the Appellant is vulnerable or has other difficulties which may affect the reliability of his evidence.

16. For those reasons, we accept that ground two is made out, principally based on the effect of the error disclosed by ground one.

Ground Four

17. Our initial view was that the challenge to the Section 72 Certificate had not been made out. However, having heard the way in which Miss Walker argued her case on ground one, we are satisfied that this ground also is made out. This is principally because one of the aspects which had to be considered is whether the Appellant continues to pose a danger to the community. We have already noted the relevance of what the Appellant says happened to him in Italy to his criminal offence. It follows that the Judge's findings on the credibility of that part of the Appellant's account are capable of affecting the finding that he continues to be a danger to the community and therefore the consideration of the Section 72 Certificate. We therefore accept that ground four is also made out based on the effect of the error disclosed by ground one.
18. In summary, we accept that there is an error of law, principally based on ground one but that this error also impacts on grounds two and four. We therefore set aside the Decision. For the reasons we have already given it is not appropriate to preserve any of the findings. Miss Walker asked that the appeal be remitted. In relation to the appropriate forum for the re-making of the decision, we have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

Having regard to the unfairness of the earlier hearing which we have identified, we are satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for redetermination.

DECISION

We are satisfied that the First-tier Tribunal decision of Judge Lingam promulgated on 11 December 2018 involves the making of a material error on a point of law. That decision is therefore set aside. We remit the appeal to the First-tier Tribunal for rehearing before a Judge other than Judge Lingam.

A handwritten signature in black ink, appearing to read 'E. Smith', written in a cursive style.

Signed
Upper Tribunal Judge Smith

Dated: 10 April 2019