**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/13472/2019

**THE IMMIGRATION ACTS**

| **Heard remotely at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 November 2020 *via Skype for Business*** | **On 1 December 2020** |

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**OD (NIGERIA)**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms A. Patyna, Counsel instructed by Wimbledon Solicitors
For the Respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

**DECISION AND REASONS (V)**

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.*

*The documents that I was referred to included the appellant's bundle from before the First-tier Tribunal, the grounds of appeal, the appellant's skeleton*

*arguments, and the decision of the First-tier Tribunal, the contents of which I have recorded.*

*The order made is described at the end of these reasons.*

*The parties said this about the process: they were content that it had been conducted fairly in its remote form.*

1. This is an appeal against a decision of First-tier Tribunal Judge A M Black promulgated on 18 February 2020, dismissing the appellant's appeal against a decision of the respondent dated 23 July 2019 to refuse her human rights claim.

*Factual background*

2. The appellant is a citizen of Nigeria born in 1969. She arrived in this country in 2005 with her then partner, Y. She claimed before the First-tier Tribunal that she had been trafficked here by Y, for the purposes of sexual exploitation and domestic servitude at his hands. She made that claim against a background of a deprived childhood in Nigeria following the death of her mother and her upbringing at the hands of an abusive aunt. Y purported to love her and said they could move to the UK together to start a new life. A short while their arrival, the abuse began. The appellant was controlled by Y, prevented from leaving the house and sexually and physically abused. Her body bears scars from the abuse she received from her aunt, and, later, from Y. The appellant eventually did manage to leave Y's home. She attempted to regularise her status with an application under the EEA regime based on a marriage with a Portuguese citizen. That application was unsuccessful, and an appeal against the refusal was dismissed on 13 March 2015. That appeal considered only Article 8 matters. She claims the relationship with the Portuguese citizen broke down in 2015. The appellant claimed to be highly vulnerable on account of her trafficking experiences and provided medical evidence to demonstrate that she experienced symptoms of depression and PTSD.

3. On 17 December 2016, the National Referral Mechanism of the Competent Authority, established pursuant to the United Kingdom's obligations under the Council of Europe Convention on Action Against Human Trafficking ("ECAT") made a positive "reasonable grounds" decision in relation to the appellant. On 23 July 2019, it made a negative "conclusive grounds" decision. On the same day, a decision to refuse her human rights claim was taken, and it was that refusal decision that was under consideration before the judge below.

4. The judge rejected the appellant's claim to have been trafficked. She found that the relationship with Y was initially genuine, and that the appellant had been a willing participant in the decision to move to the United Kingdom. It was only later that it broke down and the appellant became a victim of domestic violence. As such, the judge found that the appellant had not been trafficked here [43]. The evidence did not support

a finding that the relationship between the two had been controlling and abusive at the time they took a decision to move to this country [44]. The judge had accepted some of the medical evidence relied upon by the appellant to demonstrate her vulnerability on mental health grounds, and, although she considered that it featured some weaknesses, it did attract some weight [40]. Overall, the judge found that the appellant would not face "very significant obstacles" upon her return to Nigeria. She would enjoy the support of a friend, F, who financially supported her in this country [51], and she was embedded within her church community here, which has branches in Nigeria [53], found the judge. The judge concluded that the appellant was a resilient woman, with skills that would enable her to engage with the labour market upon her return [54]. The judge's global conclusion was that the appellant's removal would be a proportionate interference with her Article 8 ECHR rights [61], and her removal would not engage Article 3 [66].

*Ground of appeal and submissions*

5. Permission to appeal was granted by First-tier Tribunal Judge Parkes on all three grounds of appeal.

6. Ground 1 contends that the judge erred when finding that the appellant had not been a victim of trafficking. Ms Patyna relies on Article 4 of ECAT, replicated by Article 2 of Directive 2011/36, which defines trafficking as:

> "The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of the position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of the person having control over another person, for the purpose of exploitation."

The emphasis was supplied by Ms Patyna, who appeared on behalf of the appellant, as she did below.

7. Ms Patyna submits that the following finding of the judge at [43] is at odds with the definition of trafficking, because a trafficked person may well be a willing participant to the trafficking scenario, having been deceived as to what was taking place. The judge made the following findings:

> "I accept that the appellant was subjected to violence after her arrival in this country, but I am unable to find that she was viewed to the UK under false pretences **or that she was not a willing participant in the relationship**, at least at the time of entry and in the early period after her arrival here." (Emphasis added)

That the appellant may have been a willing participant is immaterial to the issue of whether she was trafficked, submits Ms Patyna. The definition of trafficking encompasses deception situations, abuses of power or abuses of a position of vulnerability. The judge's findings that the appellant was a

willing participant were at odds not only with the definition of trafficking set out above, but with a number of other findings reached by the judge concerning the appellant's experiences. Those included the fact that the appellant demonstrated symptoms consistent with those exhibited by victims of trafficking [38], the fact the appellant was susceptible as a victim of prior abuse at the hands of her aunt during her childhood [44], the fact that she entered the United Kingdom with an older man who had made all travel arrangements and kept her passport [33], [43], the fact that she was subjected to violence after her arrival here [43], [60], the fact that Y became controlling, violent and abusive [43], [44], and the fact the medical evidence demonstrated that the appellant was a vulnerable person [7], [51], [54], [60].

8. By finding that the appellant was not a victim of trafficking, despite having made findings of fact which admitted of the possibility of only a positive finding on the trafficking issue, the judge approached the issue of the appellant's prospective integration into Nigeria on the wrong footing, submits Ms Patyna. The issue of re-trafficking was not considered, and the judge took an overly favourable view of the ability of a victim of trafficking, bearing the appellant's vulnerabilities, to reintegrate. In addition, the public interest in the removal of a victim of trafficking cannot be said to be commensurate with that of the removal of a "standard" over stayer who does not share the characteristics, and past, of this appellant.

9. The second ground of appeal contends that the judge failed properly to engage with the medical report of Dr Hajioff, which had opined that the appellant's scars were consistent with her account of trafficking and domestic abuse, and that she experienced depression and PTSD, consistent with the narrative of abuse and trafficking she had provided. The judge made a factual mistake when referring to the scope of the appellant's medical records that had been before the expert, erroneously stating that the judge had not had access to the appellant's full medical records whereas, in fact, Dr Hajioff specified at the outset of the report that the appellant's GP records since 2005 had been considered. The judge ascribed some weight to the report, but discounted other aspects of it; it was not clear, submitted Ms Patnya, why she had adopted that approach and, as such, had failed to provide sufficient reasons for her findings. Overall, the judge's approach to the medical evidence was inconsistent with the approach of the authorities to an controverted expert evidence. There is no reason to conclude, as the judge suggested she was, that the appellant could have been feigning her symptoms to Dr Hajioff.

10. Ms Patnya also submits that the judge failed to ascribe sufficient weight to letters of support from a support group and a charity working with victims of trafficking, failing to give sufficient reasons for doing so.

11. The third ground of appeal contends that there was no evidential basis for the judge's findings that the appellant would enjoy the support of her church community in Nigeria. The judge had rejected the evidence of a close friend of the appellant, F, who supports the appellant presently, but

said that she would not be able to continue upon her return to Nigeria, for insufficient reasons. The findings of the judge that there would be no "very significant obstacles" to the appellant's reintegration in Nigeria were accordingly flawed, submits Ms Patnya.

12. On behalf of the respondent, Ms Isherwood submits that the grounds of appeal are merely an attempt to re-argue the case, and to disagree with the legitimate findings of fact which were open to the judge to reach. The judge's findings on the trafficking issue must be read as a whole, she submits; the judge made positive findings that the appellant had not been adhered to the UK under false pretences, and that she had been in a genuine relationship at the time, albeit a relationship which subsequently turned sour, but not one which was characterised by deception and exploitation from the outset. Ms Isherwood highlights the fact that, at the outset of the hearing before the First-tier Tribunal, Ms Patnya sought to advance the trafficking issue as a ground of appeal under the 1951 Refugee Convention, for which the respondent refused consent, and in relation to which the First-tier Tribunal accordingly enjoyed no jurisdiction: see [11]. Ms Patnya's trafficking submissions before this tribunal, submits Ms Isherwood, was simply an attempt to bypass the jurisdictional barrier which existed to the submissions being considered as a protection matter before the judge below.

13. In relation to the medical evidence, submits Ms Isherwood, the judge reached recent findings which were open to her on the evidence. The fact that the judge may have wrongly concluded that Dr Hajioff did not have available to him the appellant's earlier medical records was immaterial; Dr Hajioff accepted from the medical evidence that the appellant was a vulnerable person, and did ascribed some weight to the evidence. The reasons given by the judge for ascribing less weight to Dr Hajioff's report were open to her, and sufficiently expressed.

14. Finally, in relation to the judge's findings concerning the support the appellant would enjoy upon her return to Nigeria, whether from her church or from F, those were findings which were open to the judge on the evidence.

*Discussion*

15. I agree with Ms Patyna that, were it the case that the judge had erroneously failed properly to categorise the appellant as a victim of human trafficking, that would have been a material failure to take all relevant considerations into account, and one which would have impugned the judge's Article 8 proportionality analysis. However, I do not accept Ms Patnya's submission that that is what the judge failed to do. Read as a whole, the judge found that the appellant had not been deceived or otherwise exploited at the point she agreed with Y to move to this country. By contrast, the judge found that the appellant's relationship with Y deteriorated *after* the couple arrived in this country.

16. By way of a preliminary observation on this point, the judge was plainly aware of the nature of the submissions being advanced concerning trafficking; see [4] of the decision, whether judge outlines the appellant's claim to be a victim of trafficking, and the submissions made on behalf of the appellant that it was for the judge to reach her own findings on that issue, rather than deferring to the "conclusive grounds" decision, which had found the appellant not to have been a victim of trafficking. There were detailed submissions advanced on behalf of the appellant which the judge summarised in detail. The judge was plainly seized of the nature of the argument advanced on behalf of the appellant, and the detail of that argument.

17. Turning to the judge's operative analysis on the trafficking point, the judge made findings of fact which preclude a finding of trafficking. At [43], the judge said that she did not find that the appellant had been lured to the UK under false pretences. The judge recalled that the appellant's oral evidence had been that she came to the UK to study. The fact that Y had made the arrangements and held her passport was an insufficient basis to infer control, found the judge. Later in the same paragraph, the judge again found that "this was a genuine relationship", albeit a relationship which turned sour over time. At [44], the judge referred to the appellant as being in a "loving relationship *at the time*", referring to the pre-UK phase, and the initial stages of her relationship here. That paragraph concluded in these terms:

> "The appellant refers to this being a controlling and abusive relationship and I accept it developed into such a relationship but am unable to find it was so at the time the appellant agreed to marry this man and to migrate to the UK with him or in the early period after her arrival here. The evidence does not support such a finding."

18. Had the judge's only finding been that the appellant had been a willing participant to the move to the UK, Ms Patnya's submission would have substance. However, as Ms Isherwood submits, it is necessary to view the judge's findings in the round. The finding that the appellant was a "willing participant" was reached in the context of wider findings that, at the time, the appellant was in a genuine relationship with Y, which had not, again at that time, been controlling or abusive.

19. Ms Patnya submitted that the judge's findings concerning the genuine nature of the pre-UK phase of the relationship between the appellant and Y were irrational. Based on the judge's later findings of abuse and domestic violence, she submitted, it was irrational for the judge to have found that during the early stages of the relationship, there had been no deception of the appellant. I reject that submission.

20. In Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600 at [62], the Supreme Court held, with emphasis added:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different

> conclusion. **What matters is whether the decision under appeal is one that no reasonable judge could have reached**."

21. On the issue of the trial judge's assessment of the weight to be attached to individual pieces of evidence, the Supreme Court has summarised the jurisprudence on the issue in these terms. The principles, it said:

> "…may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

See Perry v Raleys Solicitors [2019] UKSC 5 at [52].

22. The judge was entitled, on the evidence she heard, to reach a finding that this was a genuine relationship which later deteriorated. The judge had the advantage of hearing all the evidence in the case. She had a view of the facts which this tribunal, being an appellate tribunal, does not enjoy. In Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, the Court of Appeal underlined the caution with which appellate tribunals should approach the task of reviewing findings of fact reached by trial judges. One of the reasons, said the court at [114.iv], was that:

> "In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

In my judgment, taking issue with this finding of the judge would be to engage in "island hopping". Having had regard to the whole sea of evidence and having reached the findings she did concerning the relationship with Y, the judge reached findings that were open to her on that evidence. In principle, there is nothing irrational about a judge finding that a relationship that descended into the depths of domestic violence had its origins in a genuine, non-abusive and consensual relationship between the parties.

23. Turning to the second ground of appeal, I reject Ms Patnya's submissions that the judge impermissibly rejected the evidence of Dr Hajioff.

24. While there is some force in the suggestion that the judge mistakenly concluded that Dr Hajioff had not had sight of the appellant's GP records prior to 2018, three observations are necessary.

25. First, the judge expressed concerns at [39.h] that Dr Hajioff accepted the appellant's account of having attempted suicide in the past, despite there being no references to any such attempts in the "significant history" section of the GP records. The primary concern of this aspect of the judge's analysis was that the substantive contents of the report were at odds with the contents of the GP records, which suggests that they had not been taken into account, at all or properly. That Dr Hajioff stated at the outset of the report that the notes had been included in the materials provided to him or her is of marginal relevance, when one considers this substantive deficiency.

26. Dr Hajioff did expressly refer to the appellant's GP recent notes, at [60], stating "after completing my report, I received [the appellant's] most recent GP records and medical correspondence. It was all supportive of the account she had given me[,] and I have made no changes to my report." The concern of the judge was that, while Dr Hajioff may well have considered the more recent GP notes and medical correspondence, there is nothing to demonstrate that Dr Hajioff had engaged with any of the earlier correspondence which, for the reasons given by the judge, featured a number of inconsistencies when compared to the account provided by the appellant.

27. Secondly, the judge's concerns from the Hajioff report were not so much with the analysis of Dr Hajioff, but with what the judge considered to be inconsistencies between the appellant's evidence before her, and what she had told Dr Hajioff: see [41].

28. Thirdly, it is necessary to consider the judge's analysis of the report in the round.

29. For example, at [39.b], the judge said that the appellant reported to Dr Hajioff that she experienced difficulty sleeping through nightmare disturbance. By contrast, in oral evidence, the appellant had told the judge that her sleep had been disturbed by the children of the family slept in the same bedroom, and who played computer games for most of the night. The judge observed that the appellant did not appear to have told Dr Hajioff about those environmental factors. Those were legitimate concerns.

30. At [39.d], the judge said that the account given by the appellant to Dr Hajioff had been accepted without challenge, or consideration of the possibility of fabrication, by Dr Hajioff. Ms Patnya relies on SS (Sri Lanka) v Secretary of State for the Home Department [2012] EWCA Civ 945 as authority for the proposition that that was not a valid approach. There, at [23], the Court of Appeal observed that "there is no reason to think that the doctors believed that [the appellant in those proceedings] was giving them anything other than a reliable description of her symptoms." Ms Patnya also relies on a judgment of Mr Justice Moses, as he then was, in R (oao Minani) v IAT [2004] EWHC 582 (Admin), and that of Sedley LJ in Y (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 362 to similar effect.

31. The authorities relied upon by Ms Patyna are case-specific examples of erroneous reasoning given by a judge, rather than authorities establishing a general proposition that a judge cannot have concerns of the sort expressed by the judge in the present matter. It is open to the judge to ascribe significance to the fact an expert may base their analysis wholly on an account provided by an appellant. In JL (medical reports-credibility) China [2013] UKUT 145 (IAC), the Upper Tribunal held, at paragraph 4 of the Headnote:

> "Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them."

32. Plainly, therefore, it is open to a judge to express concerns based on the account provided by an individual to an expert. In contrast to the authorities cited by Ms Patnya, the judge in the present matter had additional, well-reasoned concerns about the Hajioff report.

33. The diagnosis of PTSD reached by Dr Hajioff had not taken account of what was described as an "accidental perforation" of the appellant's uterus in 2012 and the impact of that incident on her well-being. In a letter dated 11 March 2016 from the [ ] Primary Care Centre, the accidental perforation is described as having resulted in post-traumatic stress disorder and depression. The judge notes that that diagnosis, and its cause, was inconsistent with Dr Hajioff's conclusions, and had not been addressed in the medical report. See [39.e].

34. The report of Dr Hajioff records the appellant as having reported to Dr Hajioff that she had taken an overdose of tablets in 2008, whereas a letter dated 19 April 2017 from her primary care centre refers to her having PTSD and depression, but never having revealed a plan to carry suicidal ideation into effect. See [39.h]. Ms Patnya submits that such an absence does not reveal an inconsistency between the report and the medical notes. The difficulty with that submission is that it is simply an alternative analysis of the facts; it does not demonstrate that the judge's analysis was irrational. The fact that there were no records in the GP notes of any suicide attempts further underlined the judge's concerns that Dr Hajioff had uncritically accepted the appellant's account: see 39.i, failing to engage with the medical records before him.

35. Finally, while the judge expressed some reservations with the internal reasoning adopted by Dr Hajioff's report, nothing in her global conclusions concerning the appellant's medical state, and her vulnerability, were at odds with the overall conclusions expressed by Dr Hajioff. Dr Hajioff's conclusions are at [61] to [64] of the report; they are that the appellant was suffering from depression and PTSD, and "has evidence of injury consistent with her account." Dr Hajioff said that the appellant would benefit from antidepressant medication, and some psychological treatment such as counselling.

36. The judge accepted those broad conclusions. At [40], the judge said that she gave the report "some evidential weight". She accepted that the appellant had scarring which was consistent with her being a victim of domestic violence, both in Nigeria and in the United Kingdom. The judge noted, however, that the existence of scarring is not, without more, sufficient to demonstrate that a person is the victim of trafficking; Ms Patnya has not sought to challenge that discrete aspect of the judge's analysis, rightly so. Scarring can demonstrate consistency with an account

of physical mistreatment but cannot go to the issues of “action”, “means” and “purpose” which require consideration when assessing a trafficking claim.

37. For these reasons, the judge did not fall into material error when she stated that the report of Dr Hajioff had been compiled without detailed reference to the earlier GP notes. Dr Hajioff may well have stated at the outset of the report that those records had been made available, but the substantive analysis of the report failed to address the inconsistencies between the account provided by the appellant, and Dr Hajioff’s own conclusions, and the contents of the medical records and correspondence. This ground is without merit.

38. The third ground of appeal contends that the judge reached findings concerning the appellant’s likely circumstances upon her return without evidential foundation. There is nothing in this ground. The judge was entitled to reject the evidence of F that she would not continue to support the appellant upon her return. At [52], the judge noted the “considerable” practical, emotional and financial support that F had provided, and rejected her evidence that she would not provide her with any support in Nigeria, due to fear of the money falling into the wrong hands due to corruption. The judge was entitled to form the view that F would continue to support the appellant, in view of the considerable support she had provided her with in this country, as her close friend. The judge went so far as to note that “at the very least” F would be able to give the appellant some money to take back to Nigeria upon her return, addressing the concerns that the money would fall into the wrong hands. There is nothing about this aspect of the judge’s analysis that was not properly open to her.

39. Similarly, in relation to the appellant’s membership of a church community which has several branches in Nigeria, it was open to the judge to provide that the UK community features members of Nigerian heritage, and potential contacts in Nigeria. It was open to the judge to ascribe significance to this potential support network, and provide the appellant with a degree of practical support upon her return. Throughout her narrative, the appellant has claimed to have been given practical assistance by those at church. She was introduced to Y by her pastor in Nigeria at the time. There is no suggestion that that was an introduction motivated by malice of any sort and, on the judge’s findings of fact which I have upheld, the relationship was initially genuine. Accordingly, the appellant had enjoyed support from a church in the past, claimed to have found fulfilment and community at the present time in her church, and it was open to the judge to find that support of that nature would continue in some form, at least initially, upon her return.

40. It cannot be said that the findings reached by the judge were those which no reasonable judge could have reached.

41. While another judge may have reached a different conclusion, there is nothing in the decision of this judge which involved the making of an error

of law such that the decision must be set aside. I therefore dismiss this appeal.

42. I maintain the anonymity order previously in force.

**Notice of Decision**

The appeal is dismissed.

The decision of Judge Black did not involve the making of an error of law.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 their 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 *Stephen H Smith* Date 23 November 2020

Upper Tribunal Judge Stephen Smith