Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: PA/07876/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 14 October 2020	**On 22 October 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

HB

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr J Rene of counsel, instructed by TolTops Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I indicated that I found an error of law and

intended to set the decision aside, but reserved my full reasons to be provided in writing, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Gambian national with date of birth given as 15.3.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 25.2.20, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 8.8.19, to refuse her claim for international protection made on 17.7.18.

2. The claim was made on the basis that on return to Gambia she would have a well-founded fear of persecution and/or being killed, or be at a real risk of serious harm to herself and her child, at the hands of her father, for having children with her boyfriend whilst in an involuntary arranged marriage to AK, whom she left after he raped her. In essence, the claim is that the appellant is a member of a Particular Social Group (PSG) as a person who has committed adultery.

3. The respondent accepted that women committing adultery in Gambia form a PSG. However, the claim of being forced into marriage with Abdoulie Kha (AK) and to have committed adultery with Demba Khan (DK) was rejected by the respondent on credibility grounds.

4. The First-tier Tribunal Judge found the appellant's factual claim to lack credibility and dismissed the appeal.

5. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal, as amplified by Mr Rene's oral submissions.

6. In summary, the grounds argue that the First-tier Tribunal Judge failed to give adequate reasons for finding the appellant not credible, and that the findings were marred by material errors.

7. Permission to appeal was granted by Resident Judge Zucker on 15.5.20, considering that, as the grounds contend, the judge made findings which were insufficiently supported by the evidence.

8. The grounds as drafted are at least in some respects a disagreement with the decision. For example, by reliance on the refusal decision at [12] of the decision, the judge identified an internal discrepancy in the appellant's account as to how she came to encounter AK and be raped by him. In one account she said she had been asked by her father to take dinner to her sister but in another that the person to whom she was asked to take dinner was a woman she did not know. The grounds attempt to reargue the appeal on this point, asserting that it was an inconsistency that ought not to be weighed as a major inconsistency, "*for her sister is indeed a woman and if she did not know the woman or the sister at the time of taking the food, she could not have been inconsistent as claimed*." This argument is obvious nonsense. At the hearing before me, Mr Rene attempted to argue that 'sister' was a term that might be used in Gambia for any woman but

he could adduce no evidence to support this speculative interpretation of the apparent discrepancy. In any event, it is well-established law that the weight to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254. In Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal said that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. No error of law is disclosed by this ground.

9. Complaint is next made that at [24] of the decision the judge found the fact that her alleged boyfriend's name DK appears in her passport as her husband undermined her claim to have been married to AK. It is submitted that there is no mention of DK in her passport. Having looked at the copy passport in the appellant's bundle I accept that the judge made a factual error as there is no reference to a husband in the passport. However, at [37] of the refusal decision, it is pointed out that the appellant had named DK as her husband in her visa application and that her response to challenge to this in interview at Q118-119 was that she used to state that DK was her husband on all her documents, including her passport and visa application. "*I used to say Demba is my husband*." It follows that it was the appellant's claim that DK was named as her husband in her passport. This is a point that the judge could have relied on, but did not do so. It follows that at least one of the matters upon which the judge relied as undermining the appellant's credibility is factually incorrect.

10. Complaint is also made of the judge's assertion at [22] of the decision that as "*the appellant did not inform the respondent of any of these complaints at the time of her interview*" little weight was accorded to the documents adduced which had been sent to the appellant via DHL. The sense of the sentence in question is a little difficult to follow. However, the judge indicated that little weight was given to various documents the appellant alleged had been sent to her by a friend through DHL, including complaints that she allegedly made to the police, as (1) she failed to mention any of these complaints during her substantive asylum interview and (2) because she had not provided any credible evidence as to how these documents were obtained. The judge went on within the same paragraph to find that although the appellant had produced documents regarding the birth of her daughter and her school attendance, it was implausible and not credible that she could not at the same time have obtained official document verifying the alleged marriage.

11. It is clear that at Q141 of the interview the appellant was asked whether she had approached the Gambian authorities about the threats allegedly made against her. In response, she said "*the first time*", and went on to say that the police spoke to her father but nothing came of it as they told her it was a family matter. Whilst it is correct that the appellant claimed in interview to have made complaint to the police, her answer indicated that this was done only on the

first occasion. No other complaint to the police was mentioned in interview. I accept that the judge's statement as made is factually inaccurate. However, as Mr Tan pointed out, the police document at page 26 of the appellant's bundle refers to several complaints having been lodged by the appellant, which is inconsistent with the appellant's interview account that only once did she make complaint to the police. It follows that the judge would have been entitled for this reason to give little weight to the police document. However, this was not relied on by the judge and once again an adverse credibility finding was based on a factual error.

12. Complaint is made that at [20] of the decision, the judge inaccurately recorded the submission of the appellant's legal representative to the effect that the documents supported the appellant's claim and in particular that the birth certificate showed that the daughter's father is DK. It is submitted at [13] of the grounds that counsel did not make such a submission, "*because that evidence clearly stated that the appellant at the time was married to Mr Kha and father of (the daughter). It is thus submitted that such errors had vitiated the Judge's credibility assessment of the appellant in this case*."

13. If [20] is derived from the submissions of the appellant's representative, which is not entirely clear given the way in which the decision is drafted, this ground is largely a disagreement as to what was submitted. Although Mr Rene attempted to refer me to his notes of the hearing, I pointed out that I could not take evidence from him. Nevertheless, I accept that the notification of birth at page 27 of the appellant's bundle gives the husband's name as Abdoulie Kah, a different spelling of the surname to that relied on by the appellant, and not DK. However, the child is not named. I accept that the judge inaccurately stated that DK was recorded as the father of the child. Yet again, the judge relied on a factually inaccurate statement in a credibility finding against the appellant.

14. [14] of the grounds is an attempt to reargue the appeal, asserting that the appellant was credible in her account as to the provenance of the supporting documents received via DHL. The paragraph stated that it was "*unfortunate*" that the evidence was omitted from the appellant's evidence presented before the court owing to the administrative error of her solicitors and an attempt is made to adduce this evidence, attached to the grounds. The issue for me is not what evidence might have been adduced, only what was before the First-tier Tribunal. It follows that this ground discloses an error of law on the part of the First-tier Tribunal Judge.

15. Complaint is also made of the judge's rejection at [23] of the decision of the claim to have been married to AK, because she was found not credible during interview. The judge went on to find her "*not credible regarding how she met her husband at the compound and whether she was misled into meeting him in the first place and that this led to her being raped. I do not believe that the appellant was raped by Mr Kha and that she was kept captive for two days*." The grounds complain that these conclusions were not assessed against the country background rather

than "*premising such conclusions on the inherent probabilities of such happenings in the United Kingdom*."

16. However, the judge did not state that he rejected the account because it was implausible or improbable but in fact found the account not credible. This ground is primarily a disagreement with the decision and the reference to country background is an attempt to reargue the appeal. Mr Tan pointed out that non country background information was adduced by the appellant at the First-tier Tribunal appeal hearing.

17. Nevertheless, I accept it is not clear from [23] itself what the judge's reasons were for finding the account not credible. Mr Rene deduced that the judge was referring her to the findings of the refusal decision as summarised at [12] of the decision, but it is not clear. A reading of the decision as a whole reveals some reasoning as to why the appellant was found not credible. For example, at [21] of the decision the judge rejected the explanation for internal inconsistencies in the appellant's interview as being that she misunderstood the questions because her child was crying. This explanation was rejected because she did not raise this as a concern at the time of the interview. However, [23] as drafted is unsatisfactory as the judge does not appear to have done more than accept the respondent's assertions of inconsistencies in interview and gave no adequate reasoning for accepting them.

18. Finally, the grounds assert that the judge materially erred in failing to accord any weight in the credibility assessment of the appellant to the supporting witness statement of DK, which it is said corroborates most of her account. However, this person was not called to give evidence and, therefore, the claims in his statement could not be tested. In the premises, little weight could be given to such evidence. In any event, the judge made clear at [21] of the decision that all of the evidence adduced and the submissions made had been taken into account before making findings of fact. At [12] of the decision the judge stated that all of the contents of the refusal decision had been taken into account. No error of law is disclosed by this ground.

19. Considering the decision as a whole, one is left distinctly uncomfortable by the absence of adequate or cogent reasoning. One has to infer certain findings and reasons. The decision is marred by at least three factual inaccuracies on issues in respect of which the judge made adverse credibility findings against the appellant. There are errors of law here which are material to the outcome of the appeal and which demand that the decision is set aside to be remade.

20. 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.

21. 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.

Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The remaking of the decision is remitted to the First-tier Tribunal at Taylor House, with no facts preserved.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 14 October 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*"

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 14 October 2020