IAC-BH-PMP-V2

Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/12329/2019 (V)

THE IMMIGRATION ACTS

Heard at Bradford by Skype for business
On the 6 November 2020

Decision & Reasons Promulgated
On 10th November 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

ME
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C. Philps, Counsel instructed on behalf of the appellant
For the Respondent: Mr M. Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Nigeria, appeals with permission against the decision of the First-tier Tribunal (Judge Bart-Stewart) (hereinafter referred to as the "FtTJ") who dismissed her protection and human rights appeal in a decision promulgated on the 30 January 2020. Permission to appeal was granted by FtTJ Haria on 1 April 2020.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The background to the appeal is set out in the decision of the FtTJ at paragraphs 1-15. The appellant is a national of Nigeria. On 26 October 2019 she was refused leave to enter the UK on the basis that she had made false representations in obtaining her visa. On 4 November 2019 removal directions were set for 8 November 2019. On 5 November 2019 she claimed asylum in the removal directions were cancelled. Screening interview took place on 6 November 2019 later followed by substantive asylum interview on 22 November 2019. Further representations were submitted dated 26 November 2019.

4. The factual basis of her claim was that she was born into the Christian faith, both parents being Christian. She married her husband in 2002 who was Muslim. They had children together and he had 4 Muslim wives. From a date in 2017 he became verbally and physically abusive trying to force the appellant to convert to Islam. Their eldest son converted, and he was also trying to get the appellant to change her religion. Her family and her husband's family were unable to intervene. On 1 June 2019 incident occurred where her husband chased her whilst holding a machete. The youngest child ran behind and fell into a pit full of water and drowned. The appellant also sustained an injury to her shoulder. The appellant reported to the incident to the police and her husband was arrested, interviewed, and then released. It was following his release he made threats to kill her.

5. In a decision letter dated 2 December 2019 the respondent refused her protection claim. Whilst it was accepted that she was a Christian of Nigerian nationality, the claim that she was at risk from a husband on the basis that she refused to convert to Islam or that her son would kill her was not accepted. The respondent set out within the decision letter issues of credibility concerning her account and also consideration was given to Section 8 of the Asylum and Immigration (Treatment of Claimants, et cetera) Act 2004 in the light of her immigration history and when the claim for asylum was made.

6. The respondent considered that even taking the case at the highest and accepting that the appellant had a genuine subject to fear a return to Nigeria, the respondent was of the view that there was a sufficiency of protection provided by the authorities in Nigeria and that she could relocate to another part of the country. The claim on human rights grounds was also refused for the reasons set out in the decision letter; she did not have a partner, parent or dependent child in the United Kingdom in respect for private life, there was a short period of residence and it was not accepted that they would be very

significant obstacles to integration into Nigeria. The respondent therefore refused her claim.

7. The appellant appealed that decision, and it came before the FtT on 24 January 2020. In a decision promulgated on 30 January 2020 the FtTJ dismissed her appeal finding that she had made a false protection claim to avoid removal and that she had failed to substantiate her factual claim. As a result, the FtTJ did not go on to consider sufficiency of protection or internal relocation.

8. The appellant sought permission to appeal and permission was granted on 1 April 2020.

9. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

10. The hearing took place on 6 November 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

11. I am grateful to Ms Philps and Mr Diwnycz for their clear and helpful oral submissions. Ms Philps, Counsel on behalf of the appellant relied upon the written grounds of appeal. There was no Rule 24 response from the respondent.

12. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. At the conclusion of her oral submissions which were based on the written grounds, Mr Diwnycz conceded that there were material errors of law in the decision of the FtTJ and that the decision should be set aside.

13. Therefore the parties are in agreement that the decision of the FtTJ cannot stand as a result of the errors of law that are set out in the appellant's grounds of challenge and that given the errors relate to the assessment of the evidence including the credibility of the factual issues, both parties are also in agreement that the appeal should be remitted to the FtT.

14. In those circumstances, it is not necessary for me to give great detail as to why the decision should be set aside. However, I shall set out in

brief terms why I am in agreement with the position of the parties before the Tribunal.

15. The thrust of the grounds relates to the assessment of credibility made by the FtTJ. Ms Philps on behalf of the appellant relied upon grounds 1 to 3 as set out in the written grounds. Dealing with ground 1, it is submitted that the FtTJ erred in failing to consider evidence relevant to whether the appellant had been a victim of domestic violence by reference to the rule 35 report. The FtTJ at [40] records that the respondent did not dispute that the appellant was a victim of torture. There had been a rule 35 report before the Tribunal dated 13/12/19 which reached the conclusion that the appellant may have been a victim of torture by reference to the clinical findings which it was said were consistent with that claim. The injuries noted including a scar on the right side of the abdomen of 2 cm, a scar of 4 cm on her left forearm and 2 x 3cm scar on her left breast. This evidence has been produced whilst the appellant was in detention and after the decision letter had been provided.

16. The Tribunal at [42] accepted that the appellant may have been subjected to violence by her husband but did not accept that it was on account of his requirement that she change religion. Ms Philps pointed out that at the end of the decision the FtTJ at [55] changed its position by stating “I do not consider that the appellant has been a victim of domestic violence”. Mr Diwnycz accepted that these were mutually contradictory findings. When looking at the decision, if the initial view taken at [42] was later changed by the evidence, to lead to the finding at [55], no reasons were given for disregarding the Rule 35 report and what appears to be an accepted fact that the appellant was a victim of torture (or may have been a victim of torture). This would only be an error if it were material to the outcome. However even if the judge found that her fear of persecution was not based on religion, if the appellant was a victim of domestic violence, a separate assessment was required as to whether she was at risk of harm on that basis in the light of the objective country materials. It is therefore accepted that the error was a material error because the evidence of domestic violence would have led to further consideration of state protection or the lack of and of internal relocation; both issues had been addressed on the basis of ongoing risk in the decision letter that were not considered by the judge as a result of the earlier assessment.

17. Ms Philps also submitted that the assessment of whether she was a victim of domestic violence had not been undertaken by reference to the evidence as a whole and that the judge made no findings or reference to her witness statement (the written evidence) which gave further detail. This was a material error in light of the criticism made at [42] where the FtTJ observed that her account given in the asylum interview was “vague and inconsistent” and that remained the case in the oral evidence. However as set out at paragraph 13 of the grounds, relevant details had been given concerning the asserted abuse during the time the parties were married.

18. As to ground 2, is concerned the weight placed on the asylum interview and screening interview rather than considering the evidence as a whole. When considering issues of weight it is usually stated that if a FtTJ gave insufficient weight to a particular aspect it is only if it can be properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision that such a submission can succeed. In this case the parties are in agreement that the FtTJ reached the credibility findings based on the asylum interview and that great weight had been placed on what was said in the interview without considering the appellant's witness statement. It was common ground that on four separate occasions during the interview it is recorded that a question had to be "repeated and rephrased" (see questions 27, 59, 72 and 87). Therefore, that was a matter to take into account before placing weight on the asylum interview. Furthermore, despite the difficulty in understanding, the judge found that it damaged the appellant's credibility because she did not mention at interview all the facts about her husband's decision to force her to convert religion and a criticism was made that she did not mention that the appellant's fourth wife with a specific "trigger" of this decision. However, she did mention that the problem started in 2017 which was consistent with the date on which the fourth wife was brought live at their house (see 46)) and thus that was a finding made which did not take account of the evidence.

19. This leads to ground three. The FtTJ found that the appellant's account of her daughter's death lacked credibility. However, the parties are in agreement that the judge made a material error of fact. The evidence led on behalf the appellant was that her husband had chased out of the house with a machete and the youngest daughter had run after her and then fallen into a pool of water and drowned. The judge considered this at [47] finding "it is also unclear how the child drowned when the appellant was also with her in this pool of water". However, the appellant had not claimed that she fell into a pool of water (see question 71 paragraph 13 of the witness statement). It is also accepted that the findings in relation to this event were based solely on implausibility rather than by reference to the evidence. By way of example, the Tribunal found that it was "unclear why her seven-year-old daughter would have run out of the house with her at midnight". Ms Philps submits that the Tribunal was impliedly finding that it was implausible that young child witnessing her mother being attacked by their father would follow their mother. Similarly, the Tribunal also made a finding stating, "she said she screamed it might be expected that there would be some commotion, yet the police did not attend." Again, finding that it is implausible that a woman would scream in the middle of the night in a city, but the police did not attend. Both findings fell foul of *Y v SSHD* [2006] EWCA Civ 1223 at paragraph 25 where it is stated:

> *"the fundamental (approach this principle) is that (a judge) should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over*

> *influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by Zen background in this country and by the customs and ways are in society. It is therefore important that he should seek to view it appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes."*

20. There was also a further error of fact as set out at paragraph 20 of the grounds.

21. Whilst the FtTJ did identify inconsistencies within the written documentation relied upon by the appellant, the parties agree that in light of the errors set out in relation to the credibility findings as a whole, that the assessment made did not give "anxious scrutiny" to the claim advanced by the appellant. It is therefore agreed by the parties that the decision cannot stand and should be set aside with no findings of fact preserved.

22. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I 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.

> "[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."

23. Both advocates submit that the venue for hearing the appeal should be the FtT. I have considered their submissions in the light of the practice statement recited above. As it will be necessary for the appellant to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant documentary evidence, including the expert evidence, and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing.

24. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside with no findings of fact preserved.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside. It will be remitted to the First-tier Tribunal.

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 her. 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 Upper Tribunal Judge Reeds
Dated 8 November 2020