



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/09319/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 May 2021  
(remote hearing)

Decision & Reasons Promulgated  
On 28 May 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SO

(ANONYMITY DIRECTION MADE)

Respondent

**Representation**

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr Ahmed, Counsel instructed by Woolfe & Co Solicitors

This has been a remote hearing to which both parties have consented. 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. I did not experience any difficulties, and neither party expressed any concern, with the process.

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of Nigeria who has been in the UK since 2005. She was born in 1974 and has a daughter born in 2015. She is HIV positive.
3. In 2014 she applied for asylum, claiming that she had been trafficked and was at risk of being re-trafficking if returned to Nigeria; and that she faced a risk of FGM in Nigeria. She was referred to the National Referral Mechanism (NRM). A conclusive grounds decision was made in July 2015 concluding that she had not been trafficked.
4. The appellant's asylum claim was refused by the respondent on 24 July 2015. She appealed against that decision to the First-tier Tribunal, where her appeal came before Judge of the First-tier Tribunal Ferguson. In a decision promulgated on 12 October 2016, Judge Ferguson found the appellant to be a dishonest witness. He did not accept that she had been trafficked as she claimed, or that she faced a real risk of FGM. He also found that there is treatment available for HIV in Nigeria and that her removal would not amount to inhuman or degrading treatment contrary to article 3 ECHR.
5. In September 2018 the appellant applied for leave on compassionate grounds. This was refused in December 2018.
6. In July 2019 she lodged further submissions, claiming, inter alia, that she is at risk of being re-trafficked if returned to Nigeria and that her daughter is at risk of FGM. On 9 September 2019, her application was refused. She appealed to the First-tier Tribunal. Her appeal was heard by Judge of the First-tier Tribunal Andrew ("the judge"). In a decision promulgated on 3 December 2020, the judge allowed the appeal. The respondent is now appealing against this decision.

### **Decision of the First tier Tribunal**

7. The judge did not accept that the appellant, or her daughter, faced a risk from FGM, or that the appellant had been trafficked. The judge found that, on these issues, there was no basis to depart from the findings of Judge Ferguson, who had found the appellant's account to not be credible.
8. The judge also found that HIV treatment would be available to the appellant in Nigeria and that she could not succeed under article 3 ECHR on medical grounds.
9. However, the judge found that there was a real risk of the appellant being trafficked if returned to Nigeria.
10. In paragraph 25 the judge stated:

"The appellant says that she has had no contact with her mother since she left Nigeria. Further she has had no contact with her siblings either and has no idea where they might be. It follows from this that I am prepared to accept that the appellant would be returned to Nigeria as a lone female with a young child of five

years. I further accept that the appellant is vulnerable. She has a diagnosis of PTSD...”

11. The judge found in paragraph 33 that:

“[T]he appellant has a well-founded fear on return to Nigeria, in accordance with the guidance in [*HD (Trafficked women) Nigeria* CG [2016] UKUT 00454 (IAC)] of being trafficked for the following reasons. First the appellant does not have any family members in Nigeria, nor any kind of social or support network to assist her on return. Secondly the appellant has very limited educational or vocational skills and the only paid employment the appellant has had is as a prostitute and as a cleaner. Thirdly the appellant has significant mental health problems for which treatment is recommended and planned for when the covid pandemic allows. Fourthly, apart from the possibility of an assisted return package the appellant has no financial resources either in the United Kingdom or in Nigeria to assist in re-establishing herself. Finally, there are no factors to indicate any lower risk of being trafficked for this appellant.”

12. In paragraph 36 the judge stated that she allowed the appeal on asylum and article 3 grounds.

### **Grounds of Appeal**

13. The first ground argues that the judge failed to give adequate reasons for allowing the appeal on the basis of article 3 ECHR.

14. The second ground argues that it was inconsistent with *HD* to find that the appellant would be at risk of trafficking in Nigeria because (a) she had not been the victim of trafficking in the past, (b) there was insufficient evidence to find that she would be perceived as vulnerable, and (c) she has worked as a cleaner in the UK and there was no finding that she could not find similar work in Nigeria.

15. A further argument is made in the grant of permission (by Upper Tribunal Judge Gill), where it is stated that the judge arguably failed to engage with the credibility of the appellant’s evidence that she has not had any contact with her mother and siblings and that the judge arguably failed to reconcile her finding that the appellant would be returning as a lone female with a young child with her rejection of the appellant’s evidence that she had been trafficked in the past.

### **Submissions**

16. Mr Tufan argued that the judge failed to give reasons to explain why she accepted the appellant’s claim to have no family contact in Nigeria when there were such huge credibility issues, as identified by Judge Ferguson. He argued that the judge needed to assess, for herself, the credibility of the appellant’s account before accepting any of her evidence.

17. He also argued that the judge did not have a rational basis to find the appellant was at risk of trafficking given the finding that she had not previously been a victim of

trafficking. He submitted that *HD* was not applicable to the appellant because it only concerned women who had already been trafficked.

18. Mr Ahmed submitted that circumstances have changed since Judge Ferguson's decision in 2016 because the appellant has now been diagnosed with PTSD. He argued that the appellant's mental health explains apparent inconsistencies in her narrative.
19. He also argued that it was a matter for the judge, having heard the evidence, to decide whether or not she accepted the appellant's claim to not have had contact with her family; and that the judge gave adequate reasons to support her conclusion on this.
20. He submitted that it was consistent with *HD* to find the appellant faced a risk of trafficking even if she had not previously been trafficked. He argued that *HD* is applicable to all women returned to Nigeria.

### Analysis

21. Three errors in the decision have been identified. I am satisfied that, taken together, they undermine the decision to such an extent that it will need to be set aside and remade.
22. The first error concerns the judge's finding at paragraph 25 that the appellant has no contact with her mother or siblings and would be returned to Nigeria as a lone female with a young child. The only reason given by the judge for accepting this was that the appellant said it was the case. Ordinarily that would be sufficient. As the Court of Appeal has emphasised (see, for example, *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62)) caution must be exercised before interfering with evaluative decisions of first instance judges, who need not give elaborate reasons. However, this is a case in which the appellant was found to have been dishonest in respect of the central part of her claim about being trafficked. Given this context - of there being significant adverse credibility findings - it was necessary for the judge to give at least some explanation as to why she believed the appellant's claim to not have contact with her family.
23. The second error concerns the judge's reliance on *HD*. The judge in paragraph 33 identified several reasons the appellant would be at risk of trafficking in Nigeria. These, broadly, correspond to the risk factors identified in paragraph 4 of the headnote to *HD*. However, these risk factors - and *HD* in general - are concerned with women who have previously been trafficked. The appellant, however, was found to not have been previously trafficked. The only part of the headnote to *HD* applicable to women who have not previously been victims of trafficking is paragraph 2 where it states that "it is not established by the evidence that for women in general in Nigeria there is a real risk of being trafficked". I therefore agree with Mr Tufan that the judge mis-applied *HD*.

24. The third error is the judge's finding that returning the appellant to Nigeria would breach article 3 ECHR. The judge found at paragraph 35 that the article 3 threshold was not satisfied because of the appellant's HIV status; and at paragraph 21 that the appellant (and her daughter) did not face a risk of forced FGM. It is therefore unclear why the judge, in paragraph 36, stated that the appeal was allowed on article 3 grounds.
25. I have decided to remit the appeal to the First-tier Tribunal to be heard, without any findings preserved, by a different judge. This is because the nature of the error identified in paragraph 22 above is such that the credibility of the appellant's account will need to be considered afresh. A further reason to remit the appeal is that there are no findings in the decision about the appellant's daughter and fact-finding about her circumstances will be necessary so that her best interests can be taken into consideration.

### **Notice of Decision**

The appeal is allowed. The decision involved the making of a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

Signed

*D. Sheridan*

Upper Tribunal Judge Sheridan

Dated: 14 May 2021

### **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 the appellant or any member of the appellant's 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.