IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002007
First-tier Tribunal Nos: PA/50873/2022
IA/02599/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

V W N
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms J Fisher (Counsel)
For the Respondent: Mr E Terrell (Senior Home Office Presenting Officer)

Heard at Field House on 8 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge F Allen, promulgated on 2nd May 2023, following a hearing at Taylor House on 31st March 2023. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Kenya, a female, and was born on 20th June 1956. She appealed against the decision of the Respondent Secretary of State dated 20th March 2012 refusing her protection claim on the basis of an application for asylum. After the Appellant lodged further submissions, which were accepted as amounting to a fresh claim, the Respondent Secretary of State issued another refusal decision dated 19th January 2022. It is that decision which the Appellant appeals.

The Appellant's Claim

3. The nub of the Appellant's claim is that she is a victim of domestic, sexual and gender-based violence and is vulnerable. The judge applied the Joint Presidential Guidance Note No 2 of 2010 on vulnerable witnesses. The judge also observed that there had been a previous decision by FTTJ Mitchell, dated 20th March 2012, where it had been accepted that the Appellant had been subject to abuse. Judge Allen now observed that the decision appealed against of 19th January 2022 also accepted that the Appellant had been a victim of domestic violence and FGM at the hands of her late husband. What the Appellant now also claimed was that she had a well-founded fear of persecution as a member of a particular social group because she was a lone widow; that internal relocation to Nairobi or its equivalent would be unduly harsh for her; that there were very significant obstacles to her reintegration into Kenyan life; and that there were exceptional circumstances such that her removal would lead to unjustifiable harsh consequences and a breach of Article 8 ECHR.

The Judge's Findings

4. In a detailed, comprehensive and well-compiled determination, the judge had regard to the Rule in **Devaseelan v SSHD [2002] UKIAT 00772** with respect to an earlier appeal, and observed that the Appellant's first claim for asylum had been on the basis that there was a land dispute over family property and the husband had been killed by a group of people, with her in-laws having arranged her husband's death, so that she went on to live with one of her brothers who is a pastor (at paragraph 26). FTTJ Mitchell had found the whole claim to be lacking in credibility (at paragraph 27). The fresh claim was now based upon her having suffered domestic violence and FGM from her late husband. The Appellant now maintains that her husband had died through natural causes (paragraph 31). The judge was clear in stating that the fact that the Appellant had previously been shown to be untruthful did not mean that she was not now telling the truth (paragraph 32).

5. Judge Allen, nevertheless, found that the Appellant would not be a lone woman/widow in Kenya without family support, and that she would be at risk from serious harm from her late husband's family (paragraph 33). The judge did not accept the Appellant's evidence that she was not in contact with her family in Kenya and that if returned to where her late husband resided she would not be seen as a lone widow without family support (paragraph 33). This is because on the Appellant's own evidence she was in contact with family members in Kenya and "The appellant's statement dated 12 March 2020 speaks of two of her children D and B and that D sent her two letters" (paragraph 34). The letters were to do with allegations of mistreatment of D and B by family members and by others. Judge Allen inferred that, "what these two documents tell me is that the appellant is in contact with family members in Kenya who miss her and want to help her and secondly that the authorities, in Kenya, do

respond and act when allegations and/or threats are made …" (paragraph 34). The judge rejected any subsequent suggestion that it was not D but a person by the name of Moses who sent her the documents from Kenya and that Moses is not a family member but the son of a close friend (paragraph 35). In fact, the judge was clear that the Appellant "has been in contact with various family members over the years" and that "since the decision of FTTJ Mitchell the appellant has been able to re-establish contact with her family in Kenya …" (paragraph 36). The judge also found that "The appellant is in contact with her second eldest son and his wife …" (paragraph 37).

6. The judge then went on to consider the expert evidence in the form of the country expert report of Dr Patrick James Christian, and observed that given that this report "is premised on the appellant being a lone women without family support" it did not have a direct bearing on the Appellant's situation (paragraph 39). Insofar as there was a suggestion in the expert report that the Appellant had grandchildren, the judge held that "the appellant can resume physical contact with her children and other family members and re-establish bonds that I find have remained strong" (paragraph 40). Indeed, it was "not disputed that the appellant has six children in Kenya and four siblings" such that it was not necessary for her to rely upon her late husband's family (paragraph 41). Accordingly, the judge was clear that the appellant "would not be a lone woman but on return would have the support, both emotional and practical, from her family including her adult children and siblings" (paragraph 42).

7. As for the prospect of internal relocation to Nairobi or its equivalent, the judge was clear that it would not be unduly harsh, for the reasons that had already been explained by the judge, in that the appellant would not be a lone widow without family support and at risk of serious harm through exploitation and trafficking or destitution (at paragraph 44).

8. The judge then gave consideration to the risk of suicide (see paragraphs 45 to 48). Reference was made by the judge to letters of support from the All African Women's Group (paragraph 49); to the GP records, hospital attendance records and assessments (paragraph 50); to the consultant psychiatrist's report at Newham Mental Health (paragraph 52). The judge concluded that, "I find, considering the medical evidence that the appellant, has a past history of suicidal ideation and at an assessment on 7 August 2019 the appellant said that in the past she has had thoughts of jumping in front of a car and strangling herself with a scarf …" (paragraph 53). The judge then concluded that the Appellant had PTSD and mild to moderate depression "and is receiving treatment in the UK and support from various groups" (paragraph 54).

9. In short, the judge went on to observe that, "I find, considering the medical evidence as a whole, that there is no evidential basis for concluding that the appellant is at risk of completed suicide if returned to Kenya", because although "the appellant has a history of suicidal ideation ... it is also clear from the extensive medical evidence that the appellant has been consistent in reporting" and that she has "presented to health professionals that she has no current suicidal plan or intent" (paragraph 55).

10. The judge gave particular attention to the report by Dr Waheed. He had stated that "there has been a recent overdose on her anti-depressant medication in June 2022". The judge noted that there was no reference to this in the Appellant's medical records because they stop in May 2022, "but in any event Dr Waheed's report says that the appellant has no current plans", although "The letter dated 20 June 2022 from Barbara Gehrels says that the appellant is at high risk of suicide". The judge observed that this last person "is the only health professional to have reached this conclusion and I note that Barbara Gehrels is

considering the appellant's situation in Kenya as being an elderly, single woman", which the judge observed was not the case (paragraph 57). The judge then went on also to note that Dr Waheed's report also contained the assertion that, "If the current symptoms are left untreated, her condition may worsen to the extent that it becomes resistant to treatment with an increased risk of suicide", and that "There is a risk of deterioration in her mental health if she fails to comply with medical treatment …" (paragraph 58). The judge, however, observed that "Dr Waheed does not say that the appellant is currently at risk of suicide …" (paragraph 58).

11. As for the Secretary of State's position, the judge noted that "the respondent accepts that the appellant has shown a potential infringement [of Article 3] if returned to Kenya but says that appropriate treatment is available", and that "it was not argued before the judge that appropriate treatment and medication would not be available in Kenya" (paragraph 59). Given these findings, and bearing in mind the guidance given in **AM (Zimbabwe) [2020] UKSC 17**, the judge concluded that the Appellant would not face a real risk of suicide or face a serious, rapid and irreversible decline in her state of mental health (paragraph 60).

12. Finally, with respect to there being very significant obstacles to the Appellant's reintegration into Kenyan life, the judge noted that the Appellant spoke English, had family in the form of children and siblings there, had previously worked in Kenya, and had not lost her social and cultural ties. Accordingly there would be no very significant obstacles to her integration into Kenyan life (paragraph 64). As for the infringement of her Article 8 rights, the judge was equally clear that there would be no unjustifiably harsh consequences if she were to face return in Kenya (paragraphs 66 to 67). The appeal was dismissed.

Grounds of Application

13. The grounds of application state that the judge was wrong to conclude that Daniel was the sender of the material in 2018, because she failed to take into account the Appellant's mental disorder in so stating, and also the Appellant's consistent evidence that Daniel also was mentally unwell at the relevant time of the sending, and this error was directly relevant to the judge's findings that the Appellant's family had strong bonds with her and engaged with her and will continue to offer her support, both emotionally and practically (see paragraphs 40, 42 and 54). In fact, the judge failed to have regard to the family members' witness evidence that described contact between the family members and the Appellant as being tainted by animosity and the rejection of her for fleeing Kenya and leaving them. The judge ought to have first made a clear finding of familial contact alongside the expert evidence of cultural attitudes in Kenya with respect to "Kiambu widows" (which implied the ordinary rejection by the husband's family of a woman where the husband had died).

14. On 13th June 2023 permission to appeal was given by the First-tier Tribunal. It was noted that it was arguably an error in the determination that the judge had failed to turn her mind to whether the written evidence and statements could have been impacted by the mental health problems identified by Dr Waheed and the adjustments he said would be requited to take evidence, as well as the judge's own findings that the Appellant should be treated as a vulnerable witness. The finding that the Appellant had contacted her family was attributable to a single reference to one son sending her documents, when the wider evidence showed he had significant mental health problems at the time, and that this error had the potential to undermine all the findings.

Submissions

15. At the hearing before me on 8th September 2023, Ms Fisher, appearing on behalf of the Appellant, submitted that the medical evidence had not been considered in the manner that it should have been by the judge. She referred to the "**Mibanga** point", where it was held that whilst it is immaterial what order a judge deals with the evidence, the guidance in **Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367** makes it clear, in the words of Wilson LJ that, "What the fact-finder does as his peril is to reach a conclusion by reference only to the applicant's evidence and then, if it be negative, to ask whether the conclusions should be shifted by the expert evidence". She asked to be allowed to amend the grounds. She had not been Counsel at the original hearing and had been instructed only recently.

16. Second, the judge was wrong to have concluded that "there is no evidential basis for concluding that the appellant is at risk of completed suicide if returned to Kenya" (paragraph 55). The judge's conclusion that when the Appellant returns to Kenya she would be reunited with her family ran contrary to Dr Waheed's prognosis that there was an increased tendency to suicide in any event. The failure of the judge to mention all the medical reports leads to the judge falling into this error. Afterall, she explained, there had been two reported attempts at suicide. Even if she was in contact with her family members, it was far from clear that she would have the necessary support, which would be practical and effective and that the judge had overlooked the evidence in this respect.

17. For his part, Mr Terrell submitted that he would oppose the application to amend the grounds. The fact was that there had been a degree of island hopping in this matter with the Appellant having raised an entirely different claim for asylum before Judge Mitchell, which led the Tribunal of Judge Allen to decide on the basis of **Devaseelan** principles, that the Appellant's claim was not a credible one. The decision of the judge was perfectly rational in the context of the Appellant feeling a sense of disillusionment and alienation by not being able to move around, work, and earn money so that there were "psychosocial stresses, namely housing and financial security, isolation and her immigration status which are impacting on her mental health" (at paragraph 56). It was this that led the judge, in a decision that was perfectly rational, to conclude that, "I find that, to some extent, such factors would be relieved on return to Kenya where she would be reunited with her family, not have to rely on friends and external agencies for accommodation and money and have her family as an additional protective factor" (paragraph 56).

18. In her reply, Ms Fisher submitted that Dr Waheed makes it clear (at paragraph 4.13) that it was a family friend, and not the Appellant's son who was mentally afflicted, who sent the documents, and Dr Waheed was clear (at paragraph 4.19) that for many people the recalling of "traumatic events", would lead to statements that were a misrepresentation of the truth. The Appellant had a fragmented memory afterall. The documents were sent only once in 2018 and it was not appropriate for the judge to reject the entire claim of the Appellant simply on the basis of that one document. The documents were actually a warrant and a letter from the Appellant's husband's family (see Ground 4), and the judge had neglected to note this leading her to re-establish bonds with her family members. The fact was that she could not relocate given her mental health problems.

Error of Law

19. I am satisfied that the making of decision by the judge involved the making of an error on a point of law such that if falls to be set aside. I come to this conclusion notwithstanding the

judge's otherwise well-crafted determination. My reasons are as follows. First, this is an appeal where it had already been accepted that the Appellant was vulnerable, having suffered domestic abuse and being subjected to FGM by her husband. She had mental health problems and there was a history of attempted suicide. Dr Waheed in his report made it clear that adjustments were required and the judge also, in applying the presidential guidance in relation to vulnerable witnesses, indicated quite properly at the outset of the determination that the appeal was being approached precisely on this basis. However, the determination does not in terms demonstrate that the requisite allowance was made for the Appellant in this respect.

20. Second, this is clear from the sending of one set of documents in 2018 allegedly by the Appellant's son, who has mental health problems, but which issued the Appellant, subsequently disagreed with.

21. Third, and most importantly, the report from Dr Waheed was that the Appellant had in 2019 tried to hang herself, "and more recently in June 2022 the appellant overdosed on her antidepressant medication", leading the judge to conclude that, "I find, considering the medical evidence that the appellant, has a past history of suicidal ideation …" (paragraph 53). Against this background, the decision of the judge that, "I find, considering the medical evidence as a whole, that there is no evidential basis for concluding that the appellant is at risk of completed suicide if returned to Kenya" (paragraph 55) is on the lower standard, and applying "anxious scrutiny", unsupportable. It is true that the judge goes on to state also that, "she has no current suicidal plan or intent" (paragraph 55), but the judge also records the letter dated 20th June 2022 from Barbara Gehrels which states that the Appellant is at high risk of suicide (paragraph 57). The fact that, "Barbara Gehrels is the only health professional to have reached this conclusion", is immaterial, as is the suggestion that, "I note that Barbara Gehrels is considering the Appellant's situation in Kenya as being an elderly, single woman" (paragraph 57). The medical evidence plainly needs to be revisited again given that ultimately "anxious scrutiny" has to be applied in a case such as this.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Allen pursuant to Practice Statement 7.2.(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Satvinder S Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th October 2023