Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02009/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 13 June 2019	**On 15 July 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

F A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Frantzis, instructed by Bankfield Heath, solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By decision promulgated on 10 May 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for so finding were as follows:

> "1. The appellant, FAA, was born in 1989 and is a female citizen of Nigeria. She appealed to the First-tier Tribunal (Judge Spencer) against a decision of the respondent dated 14 February 2017 to refuse her application for international protection. The First-tier Tribunal, in a decision promulgated on 6 July 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant herself did not attend court. I had a letter from the appellant's clinical psychologist, Dr Susan Odell indicating that the appellant was not mentally able to cope with the court proceedings. Mr Thorne of Counsel represented the appellant. Mr Mills, a Senior Home Office Presenting Officer, appeared for the Secretary of State.

3. The appellant's immigration history is an unhappy one. She entered the United Kingdom in September 2005 then, in 2006, applied for leave to remain as a child of a person settled here. The application was refused and the subsequent appeal dismissed. In 2014 she was served with notice for administrative removal as an overstayer and, at that stage, she applied for asylum. Mr Mills put it, those individuals who had appeared in previous proceedings before the Tribunal as family members are now claimed by her to have been her traffickers. Judge Spencer found that the appellant's evidence was unreliable and that she had failed to establish that she would face ill-treatment on return to Nigeria as she claimed. The judge did, however, find [37] that the appellant is "unfortunately suffering with mental health conditions." She has been diagnosed with depression, post-traumatic stress disorder (PTSD) and dissociative fugue. The judge did not find, however, that "these medical problems are as a result of her being trafficked or the victim of modern slavery."

4. There are two grounds of appeal but permission has only been granted in respect of the first ground. Judge Brunnen granting permission, wrote:

> "In Ground 1 it is submitted that when assessing the Article 3 claim based on suicide risk the judge erred by making a finding that was not supported by any evidence, namely that the appellant would have family support on return to Nigeria. This is arguable."

5. Judge Brunnen explicitly refused permission in respect of Ground 2 and, although Mr Thorne made some comments regarding ground 2 at the hearing, I see no reason to go behind Judge Brunnen's decision. I have, therefore, concerned myself only with ground 1.

6. Having found that the appellant was suffering from mental health difficulties, the judge considered suicide risk, applying J [2005] EWCA Civ 629 in particular, the test containing six parts set out in that judgment:

> "In our judgment, there is no doubt that in foreign cases the relevant test is, as Lord Bingham said in Ullah, whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment. Mr Middleton submits that a different test is required in cases where the article 3 breach relied on is a risk of suicide or other self-harm. But this submission is at odds with the Strasbourg jurisprudence: see, for example, para [40] in Bensaid and the suicide cases to which we refer at para 30 below. Mr Middleton makes two complaints about the real risk test. First, he says that it leaves out of account the need for a causal link between the act of removal and the ill-treatment relied on. Secondly, the test is too vague to be of any practical utility. But as we explain at para 27 below, a causal link is inherent in the real

risk test. As regards the second complaint, it is possible to see what it entails from the way in which the test has been applied by the ECtHR in different circumstances. It should be stated at the outset that the phrase "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". The cases show that it is possible to amplify the test at least to the following extent.

First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must "necessarily be serious" such that it is "an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment": see Ullah paras [38-39].

Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in Soering at para [91], the court said:

> "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which *has as a direct consequence the exposure of an individual to proscribed ill-treatment*."(emphasis added).

See also para [108] of Vilvarajah where the court said that the examination of the article 3 issue "must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka…"

Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of D and para [40] of Bensaid.

Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).

Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.

Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.”

7. The appellant asserts that the judge failed in his findings in respect of the sixth limb of the J test. She argues that the judge's findings that the appellant did have family which would support her on return to Nigeria were arguably flawed. The evidence before the judge was that the appellant's father had died and that her mother had abandoned her. Those individuals who brought the appellant to the United Kingdom had proved not to be supporters of hers. The judge had failed to take account of the fact the appellant had been out of Nigeria since the age of 15 a period of nearly twelve years. The test in J provided that there must be family support or other support arrangements for the appellant in Nigeria from the point of her arrival in the country. The judge had failed to consider this aspect of the test. The country expert, Debbie Ariyo, had attended the hearing but had not been cross-examined. Her evidence had been agreed by the parties. Miss Ariyo's report indicated that "the [appellant] will not be able to access the therapeutic support recommended by Dr Odell and Dr Biran" [66]. The grounds assert:

> "... it was simply not open to the IJ (sic) to make the findings he does regarding this unchallenged expert evidence without first putting the matters of concern to her in order that they could be dealt with. This is a fundamental principle of fairness which is all the more compelling a principle when expert evidence has not been challenged."

8. Further, the judge found that there was "some mental health treatment [available] in Nigeria". The judge had failed to recognise that "some mental health treatment" may not be the same as "effective mechanism to reduce the risk of suicide" (see J). Further, the judge had failed to consider the evidence of the psychotherapist, Josie Dale who had been working with the appellant for over a year.

9. Mr Mills, for the Secretary of State, acknowledged that the judge appeared to have paid insufficient attention to the decision of Judge Morrison albeit that the determination had been promulgated as long ago as September 2006. Judge Morrison accepted that the appellant's father had died and that her mother had abandoned her. Mr Mills, however, submitted that the circumstances of the appellant had completely changed since the time of Judge Morrison's decision. In effect, the appellant herself was now arguing that the previous decision had been based on untruths. I agree with that submission. Notwithstanding the principle of D [2002] UKIAT 000702, Judge Morrison's decision was based on an entirely different case advanced by the same appellant. I agree with Mr Mills that what Judge Spencer says at [35] in which he deals with Judge Morrison's decision provides sufficient reasons for Judge Spencer to depart from Judge Morrison's findings.

10. The expert report before Judge Spencer is more problematic. I note that the expert's evidence was agreed and that although she attended court, she was not required to be cross-examined. In consequence, Judge Spencer has not reconciled his own finding that there was "some mental health treatment in Nigeria" available for the appellant with Miss Ariyo's opinion that the appellant would not "be able to exercise the therapeutic support recommended" by her United Kingdom treating doctors. If following the hearing, the judge had

concerns regarding this aspect of the evidence, it was open to him to reconvene the hearing or to seek written submissions. Unfortunately, he chose not to take neither course of action.

11. In summary, I find (i) ground 2 may not be argued; (ii) the judge's finding that the appellant has family members able to give her support in Nigeria shall not be set aside. The judge has given detailed reasons as to why he did not believe the appellant's account and, in the light of his view of the appellant's credibility, it was open to the judge not to accept the appellant's claim that she did not have family members in Nigeria. I find also that the judge was not bound to adopt the previous Tribunal's findings on this aspect of the case which had been advanced on a completely different factual matrix advanced by the appellant. The only question which requires further determination is whether there is "effective mechanism to reduce the risk of suicide" available to this appellant in Nigeria. The other findings of the judge shall stand. The remaining issue shall be determined in the Upper Tribunal at a resumed hearing.

Notice of Decision

12. The decision of the First-tier Tribunal which was promulgated on 6 July 2017 is set aside. All of the findings of fact shall stand save those in relation to the availability in Nigeria of adequate care and medical treatment for the appellant. That issue will be determined and the decision remade in the Upper Tribunal on a date to be fixed. The resumed hearing will take place at Bradford on the first available date before Upper Tribunal Judge Lane.

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."

2. At the resumed hearing at Bradford on 13 June 2019, the appellant relied upon number of new expert reports and letters. The bundle included evidence in the form of an addendum report from Ms Ariyo; two letters from Dr Susan Odell of the Community Mental Health Team, Leeds dated 24 October 2018 and 12 September 2018 respectively; a report from the appellant's GP, Dr Brian dated 11 September 2018. Mr Diwnycz, who appeared for the Secretary of State took no issue with this new evidence or, indeed, the existing evidence put forward regarding mental health facilities in Nigeria.

3. Ms Frantzis, who appeared for the appellant at the resumed hearing, submitted that the evidence indicated that the appellant may have family living somewhere in Nigeria but that, without immediate access to family and medical support upon arrival in Nigeria, the appellant would be at serious risk. She submitted that an absent family support network, with which the appellant could not readily make contact, was as good as no support network whatever. It would be during this period immediately

following return to Nigeria that the appellant would be at serious risk of a significant collapse in her mental health leading to the possibility of suicide.

4. The updating medical evidence is helpful. The final paragraph of Dr Odell's most recent letter (albeit almost a year now old now, given the unaccountable delay in listing this appeal for a resumed hearing) reads as follows:

> "As I have stated previously, I anticipate that if [the appellant's] asylum claim were to be unsuccessful … this would present an immediate serious risk to [her] and it would cause **a sustained increase in her risk of suicide.** I cannot envisage a way in which it would be feasible to provide the intense level of support that would be required to keep [the appellant] safe before during and after any removal process and I believe that **the probable outcome of removal would be that [the appellant] would take her own life."** [*Dr Odell's own emphasis*]

5. Dr Odell has acquired an intimate knowledge of the appellant's circumstances through her sustained treatment of her. However, the doctor provides no support for her opinion that the risk of suicide could not be brought under control before and during the removal process. There is no evidence before me to suggest that the United Kingdom immigration authorities would not take the appropriate steps to very significantly diminish and most likely extinguish the risk of the appellant hurting herself from the point at which she is informed of a decision to carry out removal and during the removal process itself. Indeed, Ms Frantzis did not seek to place reliance upon this aspect of the doctor's opinion.

6. There is much more force in the doctor's view that this very high level of suicide risk would exist from the point at which the appellant disembarks upon arrival in Nigeria and findings herself, to all intents and purposes, effectively alone, without obvious family support or immediate access to mental health support. Ms Ariyo's latest report shows that mental health support in Nigeria is at best very patchy and certainly costly. Moreover, Mr Diwnycz did not submit that access to mental health support could be arranged in advance and whilst the appellant still in the United Kingdom and I do not consider it necessary to require the appellant to prove a negative in this regard. I find that it is reasonably likely that the appellant's anxiety will become severe upon acquiring full knowledge that she will be removed; that such anxiety may be prevented from leading to the appellant harming herself before and during the removal process but that the threat to her, by way of suicide, is likely to become acute and uncontrolled immediately following her arrival in Nigeria. I find that this is a relatively unusual case in which the medical evidence very clearly points towards the likely outcome for an appellant suffering what is likely to be acute mental disturbance following removal. In the particular circumstances that I find exist in this appeal, I allow the appeal of the appellant on Article 3 ECHR grounds.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 14 February 2017 is allowed on human rights grounds (Article 3 ECHR)

Signed Date 1 July 2019

Upper Tribunal Judge Lane

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