



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00552/2020_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 18 September 2020

**Decision & Reasons Promulgated
On 22 September 2020**

Before:

UPPER TRIBUNAL JUDGE GILL

Between
Ms B C

(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify her. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

I make this order because this is a protection claim.

The parties at liberty to apply to discharge this order, with reasons.

This is a decision on the papers without a hearing. In her submissions, the appellant did not address whether it was appropriate for the Upper Tribunal to proceed without a hearing. The respondent did not lodge any submissions in response to the Upper Tribunal's directions. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras

6-19 below. The order made is set out at paras 44-45 below. (*Administrative Instruction No. 2 from the Senior President of Tribunals*).

Representation (by written submissions):

For the appellant: Immigration Advisory Service (IAS).

For the respondent: (No representation).

DECISION

1. The appellant, a national of Angola born on 30 September 1978, appeals against a decision of Judge of the First-tier Tribunal Bannerman (hereafter the "Judge") who, in a decision promulgated on 16 April 2020 following a hearing on 5 March 2020 dismissed her appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 3 January 2020 to refuse her protection claim of 21 August 2019.
2. The First-tier Tribunal ("FtT") refused permission to appeal in a decision signed on 24 May 2020. Permission to appeal was granted by Upper Tribunal Judge Jackson in a decision signed on 11 July 2020, sent to the parties on 31 July 2020.
3. In her decision granting permission, Judge Jackson stated that, in light of the need to take precautions against the spread of Covid-19, she had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (1) and (2) set out on the second page of her decision, reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge Jackson proceeded to give the following directions:
 - (i) Direction (1) provided for the appellant to make submissions in support of the assertion of an error of law and on the question whether the decision of the FtT should be set aside if error of law is found, no later than 14 days after the notice of her decision to grant permission was sent to the parties; for the respondent to file and serve submissions in response, no later than 21 days after her decision to grant permission was sent to the parties; and, if such submissions in response were made, for the appellant to file a reply no later than 28 days after her decision to grant permission was sent to the parties.
 - (ii) Judge Jackson then proceeded to give a further direction which provided that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (1) and (2) may submit reasons for that view no later than 21 days after her decision to grant permission was sent to the parties.
4. In response to Judge Jackson's directions, the Upper Tribunal has received a document entitled "*Appellant's Further Submissions*" dated 14 August 2020 by the IAS, submitted to the Upper Tribunal under cover of an email of the same date timed at 15:55 hours. The respondent has not filed any Rule 24 Reply and/or any submissions in response to Judge Jackson's directions.

The issues

5. I have to decide the following issues (hereafter the "*Issues*"),
- (i) whether it is appropriate to decide the following questions without a hearing:
 - (a) whether the decision of the Judge involved the making of an error on a point of law; and
 - (b) if yes, whether the Judge's decision should be set aside.
 - (ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

6. In its submissions dated 14 August 2020, IAS did not make any submissions as to whether or not it is appropriate for the Upper Tribunal to proceed to decide the Issues without a hearing.
7. I do not rely upon the mere fact that the appellant and the respondent have not made any submissions on the question whether it is appropriate for the Upper Tribunal to make a decision on the Issues without a hearing as factors that justify proceeding without a hearing. I have considered the circumstances for myself.
8. The appeal in the instant case is straightforward.
9. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*"; Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process; paras 35 and 48 respectively of the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board [2005] UKHL 1; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*", to mention just a few of the cases in which we have received guidance from judges in the higher courts concerning the importance of an oral hearing.
10. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.
11. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.
12. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. This is a protection claim. The appeal therefore is a serious matter.

13. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.
14. Taking a preliminary view at the initial stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. It seemed to be obvious, taking a preliminary view, that the Judge had materially erred in law in his assessment of credibility.
15. There is nothing complicated at all in the assessment of the Issues in the instant case, given that the grounds are simple and straightforward and the Judge's decision straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis.
16. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.
17. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so even if there would be a lengthy delay in order to hold a hearing face-to-face or remotely or even if there is a consequent delay on other cases being heard. The need to be fair cannot be sacrificed.
18. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.
19. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

Questions (a) and (b) - whether the Judge erred in law and whether his decision should be set aside

20. The Judge rejected the credibility of the appellant's account of the events she said had occurred in Angola relating to her husband's activities. He found that she had fabricated her entire account. He did not accept that her daughters were genuinely at risk of a form of FGM in Angola.
21. The Judge therefore dismissed the appellant's appeal on asylum grounds and humanitarian protection grounds. For the same reasons, he found that there were no potential breaches of Articles 2 and 3 of the ECHR (para 71).

22. In relation to Article 8 of the ECHR, the Judge noted (at para 72) that the appellant's representative had conceded that "*there was no Article 8 case essentially being claimed here*" but he went on to say that, for the avoidance of doubt, he agreed with the appellant's representative and also with the decision made by the respondent on the appellant's Article 8 claim. He therefore also dismissed her appeal under Article 8 of the ECHR.
23. The appellant's grounds do not challenge the decision to dismiss the appeal on human rights grounds with respect of Article 8.
24. The grounds may be summarised as follows:
 - (i) Ground 1: The Judge erred in law in failing to make a finding as to whether the appellant was a vulnerable adult. His assessment of credibility was therefore impaired by this omission.
 - (ii) Ground 2: The Judge failed to adequate reasons for findings on material matters.
 - (iii) Ground 3: The Judge materially misdirected himself and/or failed to take account of material matters in relation to the appellant's claimed injury and problem with her kidneys.

Assessment

25. I am satisfied that all the grounds are established and that the Judge did materially err in law in his assessment of the credibility of the appellant's evidence in relation to her protection claim. I shall now give my reasons:

Ground 1

26. The evidence before the Judge was that the appellant had problems with her hearing. The appellant had mentioned this fact at her asylum interview. It was also raised in her pre-hearing reply notice dated 17 February 2020 which raised her hearing as an issue.
27. The Judge did not make any finding on whether she was a vulnerable witness and, if so, whether he had treated her as such, nor did he indicate whether he considered that this had impacted upon her ability to give oral evidence and his assessment of credibility and, if so, how.
28. To the contrary, he said, at para 66, that the appellant was hesitant in giving her evidence and, at para 34 (in setting out a summary of the appellant's oral evidence), he said:
 - "34. The Appellant adopted her witness statement and stated that in Angola she has a father and mother and eventually decided she had 2 brothers but had to muse over that for some considerable time."
29. The Judge made no mention of the appellant's hearing problems at paras 34 and 66 when taking into account the appellant's hesitation in giving oral evidence.
30. I am therefore satisfied that the Judge had failed to apply the Joint Presidential Guidance Note No 2 of 2010.

Grounds 2 and 3

31. Paras 64-66 of the Judge's decision, which featured heavily in his adverse credibility assessment, read:

- "64. I have to say that I did not find this witness credible. Her explanation, for example, with regard to her alleged injuries seems to be made up on the spot and did not carry any significant weight. For example, she said that only a hospital could decide whether or not her injuries were severe but that she hadn't been to a hospital. In the papers there is a claim of a scar at an interview although there are no pictures or information or evidence about if she had a scar and how it might have been caused and it is only mentioned about hearing loss otherwise with that not being put down to the alleged assault upon her. At one stage, also, she refers to having pain in the kidneys but having been in the country for significantly more than 4 months she still doesn't seem to have sought any medical help for it and certainly there was no evidence given to that effect.
65. I consider that the criticisms of her position on the claims of her husband's involvement in some form of investigation and even more so with regard to the claims that people threatened him and then came to the house, simply did not stack up even against the lower standard and her claim did not stand up to any scrutiny even against that standard.
66. I accept that if her husband had been playing some role in the investigation against this disgraced senior officer then his name wouldn't have appeared in the newspaper report but just because his name doesn't appear there on the one hand doesn't mean that he wasn't involved but on the other hand doesn't mean that he was involved. Against the lower standard I consider the claims that she makes to be ones borne out of a desperate attempt to find a reason to be able to remain in the United Kingdom and not ones borne out by the facts or circumstances even against the lower standard. She has made a claim that 4 men entered her house all by the rear of the property and claims them to police based on some items they had with them and the title given to one of them. I do not accept what she is saying here, even against the lower standard, it seems to me to be contrived and she was hesitant in giving her evidence and I give weight to the criticisms made of her by the Respondent in the reasons for refusal letter. She was, able to leave the country on her own passport and to stay elsewhere in the country for a few days before she claims she left. I did not accept her claims in that regard."

(My emphasis)

32. The Judge erred at paras 64-66 for the following reasons:

- (i) At para 64, the Judge took into account that the appellant had not been to a hospital about her injuries but, in doing so, failed to take into account the appellant's explanation in answer to question 68 of her interview and at para 18 of her witness statement that she had not been to a hospital as she could not risk exposing herself whilst receiving treatment.
- (ii) In relation to the appellant's scar, the Judge took into account, inter alia, at para 64 that there was no information or evidence about how the scar might have been caused. In this regard, I am satisfied that he overlooked the appellant's evidence at her interview that she was struck on her back during the assault on her.

(iii) In relation to the pain that the appellant said she had in her kidneys, the Judge took into account at para 64 that the appellant did not "*seem to have sought any medical help for it*" notwithstanding that she has been in the United Kingdom for "*significantly more than 4 months*". However, as contended at para 25 of the grounds, there was a letter dated 2 January 2020 from the NHS which showed that the appellant was due to attend the Urology department at the Royal Bolton Hospital on 23 March 2020. He was therefore incorrect to say that "*certainly there was no evidence given to that effect*".

(iv) For the reasons given at (i)-(iii) above, the Judge's reasoning from and including the second sentence of para 64 cannot stand. The first sentence of para 64 therefore could not stand either, as the reasoning in the first sentence was insufficiently reasoned to be capable of standing on its own.

(v) At para 65, the Judge said, *inter alia*, that he gave weight to the respondent's criticism of the appellant's evidence but, in doing so, failed to consider the appellant's responses to the refusal letter at paras 22-31 of her witness statement dated 20 February 2020 (AB1-4). I am therefore satisfied that he overlooked relevant evidence in this regard.

33. Whilst I have noted that the Judge went on to give other reasons for his adverse credibility assessment at paras 67-69, I am satisfied that his adverse assessment at paras 64-66 was material to his overall adverse assessment of credibility.
34. It is therefore unnecessary for me to deal with the remainder of grounds 2 and 3, i.e. paras 15-18 of the grounds in relation to ground 2.
35. For all of the above reasons, I set aside the decision of the Judge to dismiss the appellant's appeal on asylum grounds, on humanitarian protection grounds and in relation to Articles 2 and 3 of the ECHR.
36. The appellant's representative before the Judge conceded, on her behalf, that "*there was no Article 8 case essentially being claimed here*" (para 72 of the Judge's decision). The Judge said that he agreed with him and with the respondent's decision on the appellant's Article 8 claim. He proceeded to dismiss the appellant's Article 8 appeal.
37. The grounds did not challenge the Judge's decision on the appellant's Article 8 claim.
38. Accordingly, the re-making of the decision on the appellant's appeal is limited to the asylum and humanitarian protection grounds and (in relation to the human rights ground) the related claim under Articles 2 and 3, although it is difficult to see how Article 2 can be established.
39. The re-making of the decision will include a re-assessment of credibility afresh. None of the Judge's findings at paras 63-71 shall stand. His record of her oral evidence, at paras 34-42 shall stand as the record of her evidence to the FtT save that the first sentence of para 34 shall be read as set out below so as to delete his observation of the manner in which the appellant had given her oral evidence:

"The Appellant adopted her witness statement and stated that in Angola she has a father and mother and she had 2 brothers."

40. I turn now to consider whether the appeal should be remitted to the FtT or whether the Upper Tribunal should re-make the decision on the appellant's appeal.
41. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it 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.”
42. It is plain from my reasoning above that the appellant's case simply has not been considered by the Judge. There is no mention of her witness statement and no engagement with her response to the refusal letter. There is no mention of the letters from the NHS notwithstanding that the Judge took into account that the appellant had not sought medical help for her problem with her kidneys. He did not take into account her evidence at her interviews in making his adverse assessment on various matters.
43. In these circumstances, and taking into account that this is a protection claim that includes a claim for protection for two separate reasons (namely, the activities of the appellant's husband in certain investigations and also her fear that her daughters will be subjected to a form of FGM), I am satisfied that this case falls within para 7.2 (b) of the Practice Statements. I therefore remit this appeal to the FtT.

Notice of Decision

44. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appellant's appeal on asylum grounds, on humanitarian protection grounds and (in relation to the appeal on human rights grounds) with respect to Articles 2 and 3 only is set aside. The decision to dismiss the appeal on human rights grounds with respect to Article 8 stands.
45. This case is remitted to the First-tier Tribunal for a fresh hearing of the appellant's appeal on asylum grounds, humanitarian protection grounds and the related claims under Articles 2 and 3 of the ECHR, by a judge other than Judge of the First-tier Tribunal Bannerman.

Signed Date: 18 September 2020
Upper Tribunal Judge Gill

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email