Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11548/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 6 March 2018	**On 27 March 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

PO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Fraczyk instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr K Hibbs, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Zimbabwe who was born on [ ] 1982. She arrived in the United Kingdom on 1 May 2014 as a visitor with leave valid until 7 October 2014. On 7 October 2014, she claimed asylum. On 12 December 2014 the Secretary of State refused the appellant's claim for asylum and made a decision to remove her to Zimbabwe.

3. The appellant appealed against that decision to the First-tier Tribunal. Judge M M Thomas dismissed the appellant's appeal on all grounds.

4. The appellant was granted permission to appeal to the Upper Tribunal on the basis that the appellant should have been granted an adjournment in order to obtain effective legal representation. In a decision sent on 6 December 2016, the Upper Tribunal set aside the decision of Judge Thomas and remitted the appeal to the First-tier Tribunal for a *de novo* rehearing.

5. The remitted appeal was heard by Judge Fowell on 30 January 2017. The judge made an adverse credibility finding and did not accept that the appellant would be at risk on return to Zimbabwe. He dismissed the appellant's appeal on all grounds.

6. The appellant again sought permission to appeal to the Upper Tribunal challenging the judge's adverse credibility finding. Permission was initially refused by the First-tier Tribunal but on 6 September 2017, the Upper Tribunal (UTJ Canavan) granted the appellant permission to appeal.

7. On 22 September 2017, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

A Preliminary Matter

8. At the outset of the hearing I raised with both representatives that I had been the Upper Tribunal Judge who had set aside the initial First-tier Tribunal decision of Judge Thomas and remitted the appeal to the First-tier Tribunal for a rehearing. I enquired from both representatives whether they had any objection to me dealing with the current appeal. I indicated that if either did so object, then the appeal could be relisted before a different Upper Tribunal Judge.

9. Mr Fraczyk indicated that he wished to take instructions and consult with those instructing him. Following a short adjournment, Mr Fraczyk indicated that the appellant had no objection to my determining this appeal. On behalf of the Secretary of State, Mr Hibbs indicated that the Secretary of State also had no objection.

10. In those circumstances, I considered it appropriate to continue hearing the appeal, noting that my previous involvement with the appeal at an earlier error of law hearing did not involve any consideration of the evidence or merits of the appellant's appeal but related solely to an issue of

procedural irregularity arising from the previous judge's failure to grant an adjournment.

Discussion

11. Mr Fraczyk relied upon the three grounds of appeal but, in particular, he placed reliance upon ground 1.

12. Part of the appellant's account was that whilst she was in Zimbabwe she had been detained by the police and whilst in detention had been raped.

13. The judge dealt with this at paras 58-60 of his determination. He identified a discrepancy between the account given to a medical expert (Dr Buttan) and what was said by the appellant in her witness statement. The judge said this:

> "58. Secondly, there is the account of the rape itself. It is described very briefly in the medical report:
>
> > 'She reports being detained, hand cuffed and raped by five men there. One of them was called 'Rugare'. Then she was shut off in a room. She was subject to torture and interrogation for approximately four hours. She reported that she has passed out and was quite scared for her life.'
>
> 59. This is an extraordinarily bald account. The rape is mentioned almost in passing, as indeed it is in the appellant's own witness statement. No further details are given of the interrogation or the torture in either document. In fact, the appellant does not claim in her witness statemen to have been tortured at all, which makes it very difficult to accept any aspect of this episode.
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> 60. A further and most conspicuous discrepancy is that although the appellant mentions in her witness statement that there were four of five men involved, she states that all bar one, Rugare, had left the room, and so it was just him who raped her. It is simply not possible to reconcile an account of rape by 4 or 5 men with one of being raped by one person."

14. Then at paras 64-65, the judge reached the following conclusions:

> "64. Overall, given the failure to mention it earlier, the conflicting accounts of the circumstances leading to her detention by the police and the major discrepancies between the appellant's witness statement and the account given to the expert, I cannot accept that there is any real likelihood that this rape incident occurred.
>
> 65. This drastically affects my view of the appellant's credibility, and I have to conclude that she is not a credible witness as a result. This view reinforces my concerns about her account of the events which led her to leave Zimbabwe in the first place, and I cannot accept that she had any political profile at that time. I do not accept her account of the ongoing dispute with [BM] at any point."

15. The reference to "BM" in the final sentence at para 65 is to a pro-government supporter whom the appellant claimed encountered her prior to her detention and was the cause of that detention.

16. Mr Fraczyk submitted that the judge had, through no fault of his own, been wrong to rely upon a discrepancy between the appellant's evidence as given to Dr Buttan and in her witness statement. Mr Fraczyk sought to rely upon an e-mail from Dr Buttan dated 23 February 2017 in which Dr Buttan sought to correct what he had said in his medical report. There, Dr Buttan said this:

> "I reviewed my notes on PO and confirmed that she had reported 'being handcuffed, driven in an unmarked car and detained by five men in ZANU-PF Head Quarters, a person name {R] started touching her and raped her. When asked about duration and further details of rape, she reported that she had passed out, she does not remember exact details and was scared for her life, shocked and had panic attacks. They shut her off in a room and interrogated her which lasted for nearly 4 hours'."

17. Mr Fraczyk sought permission to admit this new evidence under rule 15(2A) of the Procedure Rules. He submitted that it demonstrated that there was, in fact, no discrepancy between the appellant's account given to Dr Buttan and in her witness statement. She had consistently said that she had been raped by one person ("R") and had not said that she had been tortured. Mr Fraczyk submitted that this factual error (amounting to an error of law) materially flawed the judge's adverse credibility finding.

18. Mr Hibbs did not object to the admission of the new evidence from Dr Buttan. However, he submitted that I should not find that the judge erred in law on the basis of it. There was, he submitted, no copy of Dr Buttan's notes merely an e-mail from him. He submitted that without a copy of Dr Buttan's notes, to set aside the judge's adverse credibility finding would set a difficult precedent. He acknowledged that, if a copy of Dr Buttan's notes had been provided supporting what he said, then apart from materiality, he would not argue against an error of law being established.

19. He submitted, however, that even if, on the basis of Dr Buttan's e-mail, the judge's reasoning in para 60 was flawed, nevertheless that was not material to his decision. The judge would have reached the same conclusion in any event. He relied upon the fact that the vast majority of the judge's reasoning was not challenged. Indeed, Mr Hibbs pointed out that in paras 64-65, the judge in concluding that the appellant was not a credible witness and rejecting her account of being raped, had relied upon other matters, including the implausibility of the alleged encounter between BM and the appellant at a post office whilst the appellant was seeking a passport (see in particular paras 55-57 of the determination). Further, Mr Hibbs relied upon para 66 of the judge's determination in which he stated that "regardless of those conclusions", he did not accept that the appellant was on a "wanted list" as she had been released by the

police and had subsequently left Zimbabwe without being stopped at the airport. Consequently, she could not be on a wanted list and therefore at risk.

20. It was, in my judgment, entirely proper for the parties to accept that the new evidence from Dr Buttan in his e-mail should be admitted. In my judgment, the criteria in Ladd v Marshall [1954] 3 All ER 745 were met. First, the new evidence could not with reasonable diligence have been obtained prior to the First-tier Tribunal hearing as Dr Buttan only appreciated his mistake after the appeal decision, and the judge's reliance upon what Dr Buttan said the appellant had told him during her consultation, was produced. Secondly, the new evidence is plainly important to an issue, namely the adverse credibility finding. Thirdly, the evidence is apparently credible emanating from a Consultant Psychiatrist who has already produced an expert report on the appellant.

21. I see the force of Mr Hibbs' submission that evidence of this sort, correcting an earlier expert report, might be better presented in a more formal way. In addition, it would have been more helpful if Dr Buttan had provided a copy of his notes of his consultation rather than simply including an extract in his e-mail. These matters, however, can only be relevant to the reliability and cogency of the evidence presented. Form cannot trump substance. Dr Buttan places in quotation marks the relevant parts from his notes. There is no basis whatsoever for concluding that this evidence is unreliable. Dr Buttan is, as is clear from the terms of his report and the new evidence, a Consultant Psychiatrist and is undoubtedly an "expert". He is a professional person regulated by a professional body, namely the General Medical Council and is required to abide by appropriate professional standards, including when acting as an expert. In these circumstances, I accept what Dr Buttan sets out in his e-mail. In my judgment, that demonstrates that the judge made a mistake of fact amounting to a mistake of law. Albeit through no fault of his own, the judge relied upon evidence which is clearly demonstrated now to have been mistaken. That evidence was significant to the assessment of the appellant's credibility. Applying the approach in E&R v SSHD [2004] EWCA Civ 49 I am satisfied that the judge erred in law when he relied upon an apparent discrepancy in the appellant's evidence as given in her consultation with Dr Buttan and subsequently in her witness statement. In truth, there was no such discrepancy either in relation to how many men she claimed raped her or whether she was, or was not, tortured.

22. That discrepancy was, in my judgment, self-evidently material to the judge's adverse finding in respect of whether the appellant had been detained and raped. The judge made specific reference to it in para 64 of his determination and concluded that:

> "I cannot accept that there is any real likelihood that this rape incident occurred."

Immediately following that in para 65 the judge went on to say:

> "... this drastically affects my view of the appellant's credibility, and I have to conclude that she is not a credible witness as a result." (my emphasis)

23. Consequently, although the judge gave a number of other reasons that led him to doubt the appellant's credibility, I am satisfied that the "major discrepancies" (which do not exist) materially led him to find that he did not accept, even on the lower standard, that the appellant had been raped. That "drastically" affected his overall view of the appellant's credibility which he rejected in para 65. That is, perhaps, what might be expected if the judge rejected a central part of the appellant's claim namely that she had been detained and raped by the police as a result of either her MDC profile or, as was also put to the judge, because of her Nigerian name (she has a Nigerian husband) and the animosity directed against Nigerians in Zimbabwe at that time.

24. In my judgment, once the central plank in the appellant's account (namely her detention and rape) was rejected but on a basis which now cannot be sustained, I am unpersuaded that the judge would necessarily have reached the same conclusion on the appellant's credibility despite finding other aspects of the appellant's account (which as Mr Hibbs submitted were largely not challenged) implausible or led him to doubt the truthfulness of the appellant's account.

25. Mr Hibbs also relied upon para 66 of the judge's decision and submitted that, even if the adverse credibility finding could not stand, the judge would, in any event, have found against the appellant on the basis that he was not satisfied for other reasons that she was on a "wanted list". At para 66, the judge said this:

> "66. Regardless of those conclusions, the obvious difficulty for the appellant is that she was released by the police, which is at odds with the claim to be on a wanted list. She was not arrested, or summoned to attend court; she was not required in some way to demonstrate her loyalty to Zanu-PF; she was simply allowed to leave, both by the police and subsequently at the airport. Her claim that in a conversation in her mother 2014 she was told that she was on a wanted list is also not credible, and nothing had changed since her leaving the country to warrant this. I find this too to be invented."

26. In my judgment, it would be wrong to place the weight upon the judge's reasoning in para 66 which Mr Hibbs invited me to do. First, it is a single paragraph in a substantial section of the determination beginning at para 42 and headed "conclusions" setting out the judge's findings. The bulk of his findings is, undoubtedly, directed to making an adverse credibility finding which cannot stand. Secondly, and more importantly, part of the judge's reasoning in para 66 is itself based upon a conclusion that the appellant's claim to be on a wanted list "is also not credible". Para 66, of course, immediately follows para 65 in which the judge, having rejected the appellant's evidence concerning the rape, states that "[t]his drastically affects my view of the appellant's credibility". Given its proximity in the

judge's reasoning, it is difficult to exclude the possibility that his conclusion on the appellant's account of being detained and raped, which in itself affected his view of the appellant's credibility, did not more generally factor into and influence his reasoning in para 66 despite his introductory phrase of "[r]egardless of those conclusions" at the outset of that paragraph. There is, in my judgment, some merit in Mr Fraczyk's submissions that the reasoning is, in effect, too condensed and fails to provide reasons as to why she would necessarily have been on a "wanted list" prior to her departure from Zimbabwe.

27. For these reasons, therefore, I am satisfied that the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the material making of a material error of law.

28. In the light of my conclusion on ground 1, it is unnecessary to deal with the appellant's grounds 2 and 3 which Mr Fraczyk did not press before me.

Decision

29. For these reasons, therefore, the First-tier Tribunal materially erred in law in dismissing the appellant's appeal and its decision cannot stand and is set aside.

30. Regrettably, as the appeal has already been remitted on a previous occasion to the First-tier Tribunal, given the nature and extent of fact-finding required, the appropriate disposal of this appeal is to remit it again to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge M M Thomas and Judge Fowell.

Signed

A Grubb
Judge of the Upper Tribunal

23, March 2018