



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10942/2018

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 1 August 2019

Decision and Reasons Promulgated  
On 12 August 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

I K K  
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Miss Pickering instructed by Legal Justice Solicitors.

For the Respondent: Mrs R Pettersen Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Fox ('the Judge') promulgated on 24 April 2019 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

## Background

2. The appellant is a citizen of Namibia born on 1 July 1997 who entered the United Kingdom lawfully as a visitor on 18 December 2016. The applicant claimed asylum which was refused against which the appellant appealed on 13 September 2018.
3. The Judge sets out findings of fact from [44] of the decision under challenge.
4. The appellant sought permission to appeal asserting, inter alia, a failure to apply the Joint Presidential Guidance Note No. 2, 2010 and related case law.
5. Permission to appeal was granted by another judge the First-tier Tribunal on 6 June 2019, the relevant section of which is in the following terms:
  - “3. It is apparent from [39] that the judge was addressed about the appellant’s vulnerability and the Presidential Guidance about dealing with vulnerable witnesses. Despite this there is no reference in the Judge’s decision to the vulnerability (or otherwise) of the appellant being taken into account when considering the appellants credibility. It is arguable in these circumstances that the Judge’s decision involves an error of law as set out in **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123**. It is also arguable that the Judge has given inadequate reasons for treating the experts evidence as having little probative value.”

## Error of law

6. There is no dispute that the issue of the appellant’s vulnerability was raised by her representative at the start of the hearing as the Judge clearly records this in his Record of Proceedings. Notwithstanding, the Judge makes no mention at all of the Joint Presidential Guidance Note No.2 of 2010 or the case of **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123**.
7. In [30-33] of *AM* the Court of Appeal found:
  - “30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.
  31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

- a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
  - b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);
  - c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
  - d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
  - e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).
32. In addition, the Guidance at [4] and [5] makes it clear that one of the purposes of the early identification of issues of vulnerability is to minimise exposure to harm of vulnerable individuals. The Guidance at [5.1] warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who are better placed than the Secretary of State's representatives to have access to private medical and personal information. Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered e.g. whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice. The SRA practice note of 2 July 2015 entitled 'Meeting the needs of vulnerable clients' sets out how solicitors should identify and communicate with vulnerable clients. It also sets out the professional duty on a solicitor to satisfy him/herself that the client either does or does not have capacity. I shall come back to the guidance to be followed in the most difficult cases where a guardian, intermediary or facilitator may be required.
33. Given the emphasis on the determination of credibility on the facts of this appeal, there is particular force in the Guidance at [13] to [15]:
- "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.

14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

8. The Judge is criticised for failing to set out in the determination an explanation for how the appellant's vulnerability has been factored into the weight to be given to the appellant's credibility or the weight to be given to the evidence. It is also argued the Judge did not adequately consider the expert report.
9. There is no indication that in making the adverse finding any regard was given to the appellant's vulnerability. Miss Pickering is correct when referring to the fact that there is no reference in the decision to either the Presidential Guidance on the assessment of evidence from vulnerable witnesses or mention of or specific application of the principles set out in the above case law. It is therefore not possible to ascertain whether the Judge did apply relevant guidance when assessing the weight to be given to the appellants evidence or, even if the same was in the Judge's mind, how such weight was assessed in light of the vulnerability.
10. As it is not clear an appropriate assessment of the evidence was made it is not established the Judge's findings are sustainable. Accordingly the determination shall be set aside with no preserved findings and the appeal remitted to the First-tier Tribunal sitting at Manchester to be considered afresh by a judge other than Judge Fox.

### Decision

11. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to Manchester to be heard afresh by a judge other than Judge Fox.**

Anonymity.

12. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 1 August 2019