Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA124642015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th May 2017	**On 22nd May 2017**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

IA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Halim of Counsel
For the Respondent: Mr S Withwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Raymond promulgated on 16 December 2016, in which her appeal against the Respondent's decision to refuse her asylum and human rights claim dated 9 September 2015 was dismissed.

2. The Appellant is a national of Nigeria, born on [ ] 1971 who first entered the United Kingdom in 2006 and has remained unlawfully since then. The Appellant made an unsuccessful application for leave to remain on medical grounds in 2011 and claimed asylum on 27 May 2014, further to which she underwent a screening and substantive asylum interview. The Appellant's asylum claim was on the basis that she feared return to Nigeria because of her past experiences there and because of her HIV status. She also relied on her medical conditions, family and private life in the United Kingdom.

3. The Respondent refused the Appellant's claim on the basis that she did not accept that she would be at risk of harm on return from her family members or others due to her health conditions and did not find the Appellant to have been credible, in part due to the delay in making her asylum claim until 2014, some eight years after she first arrived in the United Kingdom. In any event, there was a sufficiency of protection for the Appellant in Nigeria and she had the option of internal relocation. The Respondent refused the application on humanitarian protection grounds and under Articles 2 and 3 of the European Convention on Human Rights for the same reasons. The Respondent also refused the application on family and private life grounds as the Appellant did not meet the requirements of paragraph 276ADE or Appendix FM of the Immigration Rules and there were no exceptional circumstances for a grant of leave to remain outside of the Immigration Rules.

4. The Respondent gave separate consideration as to whether the Appellant should be granted discretionary leave to remain on the basis of her medical conditions, but declined to do so on the basis that her conditions were not at a critical stage and treatment was available in Nigeria.

5. Judge Raymond dismissed the appeal on 16 December 2016 on all grounds, finding that the Appellant was not credible, would not face a real risk of persecution on return to Nigeria and that her medical conditions did not meet the high threshold for a grant of leave to remain on that basis.

The appeal

6. The Appellant appeals the decision of Judge Raymond on a single ground that he failed to apply the 'Child, Vulnerable Adult and Sensitive Witness Guidance 2010' (the "Guidance"). The consequences of this were a material error of law by not considering the evidence before him in accordance with that Guidance.

7. Permission to appeal was granted by Judge Osborne on 17 March 2017.

Findings and reasons

8. At the First-tier Tribunal hearing, the Appellant's representative sought a ruling that the Appellant was a vulnerable witness pursuant to the Guidance which was refused by Judge Raymond for the following reasons:

"… there was no report on the mental health of the appellant. Dr Oyebode himself as has been noted did not have access to such a report. Also because the Practice Direction and Guidance highlight that this is a matter which ought to be properly canvassed at CMRH so that appropriate steps can be taken at the substantive hearing if required. Whereas this matter had come before me on 06.07.16 when the appellant was represented by Ms H Manis of Mishcon de Reya, representing the appellant on a pro bono basis, and she was in the throes of leaving that firm so as to set up her own firm, the present representatives, and there had not been a smooth transfer of the file so as to take into account this transition, so that Ms Manis would have formally been on the record. This also placed Ms Manis in difficulty over the medical evidence (presumably Dr Oyebode) which had been requested and not pursued it would seem. In the circumstances I considered it in the interests of justice to allow an adjournment with Directions. The matter had already been adjourned on 11.01.16 on a paper CMHR. There was therefore plenty of opportunity to address the desirability of a vulnerable witness ruling before the matter came back before me."

9. At the hearing before me, Counsel for the Appellant relied on the written grounds of appeal and submitted that the refusal to apply the Guidance was plainly a material error of law as its application would have affected the First-tier Tribunal's assessment of the evidence to determine the appeal. In response to the reasons Judge Raymond gave for refusing to apply the Guidance, it was submitted that the Guidance continued to apply and matters must be considered at the commencement of the substantive hearing even if not identified at the CMHR and that there was medical evidence as to the Appellant's mental and physical health available to the First-tier Tribunal.

10. In reply, the Home Office Presenting Officer submitted that the Guidance was considered and three reasons were given for it not being applied; first, that there was no previous request at the CMHR; secondly; there was no medical report and thirdly, it was in the interests of justice to proceed given the previous adjournments of the appeal. It was apparent from the decision that the Appellant gave only brief oral evidence and was not subject to onerous questioning so there was no material effect of not applying the Guidance at the hearing itself. Overall, given that the First-tier Tribunal considered that the Appellant's account was inherently implausible and made adverse credibility findings, the failure to apply the Guidance was not material to the outcome.

11. The Guidance covers appellants who are vulnerable and/or could be sensitive witnesses. That includes those with mental health problems and could include those who are vulnerable because of what has happened to them in the past. The First-tier Tribunal had before it a letter dated 12 of August 2016 from Dr Mahazu Yisa and Dr Eben Jones confirming that the Appellant was a registered patient with them and that amongst other conditions, she was suffering from severe anxiety and depression, currently being treated with an SSRI and being followed up by Dr

McMullen, a Consultant Liaison Psychiatrist at King's College Hospital. The letter confirms that the Appellant remains vulnerable and has a fragile mental state and that given her significant mental and physical health problems, there was a request for a sympathetic approach when considering her appeal.

12. There was also a psychiatric report from Dr Oyebode which stated that he did not have any details of the Appellant's psychiatric care and that there was no clinical evidence of a primary mood disorder. He found that the Appellant's mental state was stable further to the treatment she was currently receiving at that time. He did however record that on examination the Appellant was taciturn and sombre with a low mood, also that she reported sleeping difficulties and regular suicidal thoughts.

13. There was sufficient evidence before the First–tier Tribunal that the Appellant was a vulnerable adult and prima facie fell within the Guidance. For the Judge to have stated that there was no report on mental health of the appellant is firstly not entirely accurate and secondly ignores the evidence that he did have before him of mental health difficulties, even if not self-contained in a specific report. In light of the material that was available it was irrational for the First–tier Tribunal to not apply the Guidance for lack of a mental health report.

14. The Guidance makes specific provision for what should happen before the substantive hearing, during the hearing and in the determination of the appeal. So far as is material for the present appeal, it provides as follows for what is to happen before the substantive hearing:

4. Insofar as it is possible potential issues and solutions should be identified at a CMRH or prehearing review and the case papers noted so that the substantive hearing can proceed with minimal exposure to trauma or further trauma of vulnerable witnesses or appellants. It is important not to assume that an individual will want specific or particular arrangements made.

5. Where there has not been a pre hearing review or CMRH or the parties were inadequately prepared these matters should in any event be considered at the commencement of the substantive hearing.

15. The Guidance goes on to note that the primary responsibility for identifying vulnerable individuals lies with the party calling them but representatives may fail to recognise vulnerability. Given the noted difficulties of the Appellant's representative at the CMHR and problems with the transfer of the file, it was all the more important for the First-tier Tribunal to give fresh consideration of the Guidance when raised at the substantive hearing.

16. It is clear from the Guidance that the failure to raise its possible application at a CMHR does not mean that the Guidance has no application to either the substantive hearing or the determination of the appeal. To

the contrary, it expressly states that these matters should be considered at the commencement of the substantive hearing. Although Judge Raymond considered the request for the Guidance to apply, his failure to actually apply it because it was only raised at the substantive hearing was clearly not in accordance with the Guidance and an error of law.

17. The further reason given as to past adjournments has no bearing on whether the Guidance should have been applied to this Appellant. It may have been the case that a further adjournment of the substantive hearing should have been considered if adjustments for the conduct of the hearing were required and could not be accommodated on the day, but that was by no means inevitable and the application of the Guidance did not necessarily lead to any delay in the determination of the appeal.

18. As to the determination of the appeal following the hearing, the Guidance, so far as material to the present appeal, states as follows:

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 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 effects the Tribunal considered the identified vulnerability had in assessing the evidence before it and as to whether the Tribunal was satisfied with 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.

19. As the Guidance had not been applied to the Appellant at all, paragraphs 14 and 15 as to the assessment of evidence and determination of the appeal had not been considered or applied. This amounts to a material error of law as the Appellant has not had the benefit of the Guidance when her claim and evidence was assessed by the First-tier Tribunal. It is not appropriate to suggest that there would be no material difference because of the finding of inherent implausibility of the claim given that that conclusion was reached without taking the vulnerability into account. It is impossible for me to find that the outcome of the appeal would inevitably have been the same had the Guidance been properly applied to the Appellant. I therefore allow the appeal and set aside the First-tier Tribunal's decision dated 16 December 2016 and remit the appeal for a complete rehearing.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal for a de-novo hearing.

Directions to the parties

1. This appeal is remitted to the First-tier Tribunal for complete rehearing. There are no preserved findings of fact.

2. Any further evidence relied upon shall be filed with the First-tier Tribunal and served upon the other party no later than 14 days prior to the hearing of the remitted appeals.

3. The Appellant is to file with the First-tier Tribunal and serve upon the Respondent no later than 14 days prior to the hearing of the remitted appeal a skeleton argument setting out relevant issues, with reference to evidence and case-law.

4. The First-tier Tribunal may issue further directions as required.

Directions to administration

1. The appeal is remitted and shall be heard at the Harmondsworth hearing centre on a date to be fixed by that centre.

2. The remitted appeal is to be listed before any Judge except Judge Raymond.

3. There is a time estimate of 3 hours for the hearing.

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.

Signed  Date 18th May 2017

Upper Tribunal Judge Jackson