Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09710/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 June 2017	**On 03 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

AB (ALBANIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Priya Solanki, Counsel instructed by Barnes Harrild Dyer Sols
For the Respondent: Mr P Nash, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Swaniker sitting at Taylor House on 18 October 2016) dismissing her appeal against the decision of the Secretary of State to refuse to recognise her as a refugee, or as otherwise requiring international or human rights protection. The appellant's claim was that she feared persecution and mistreatment from her father, who abused her and tried to force her into a

marriage to pay off his gambling debts. She also claimed to fear persecution by the people who had trafficked her, and who had forced her into prostitution. The Competent Authority reached a negative conclusion on the appellant's claim to be a victim of trafficking, and the respondent rejected her asylum claim. The First-tier Tribunal Judge dismissed her appeal on all grounds raised, and made a finding that her marriage to a Greek national was a marriage of convenience.

The Reasons for the Grant of Permission to Appeal

2. The appellant applied for permission to appeal, advancing a number of grounds of appeal. Her representatives pleaded that the Judge had erred in her approach to the assessment of the appellant's credibility. The Judge had failed to consider the Country Guidance case of **TV and AD (Trafficked women) CG [2016] UKUT 0092 (IAC)**. The Judge's reasons for rejecting the medical report of Dr Thomas were erroneous. The Judge should have attached more weight to the expert reports of Dr Thomas and Ms Antonia Young than she did. The Judge found that the appellant's marriage was a sham, but the respondent had never suggested that to be the case.

3. Permission was initially refused by Judge Osborne. He held that, contrary to what was stated in the grounds, the Judge had given a careful and well-reasoned decision, and in her reasons the Judge had set out the pertinent issues, the law, and the evidence relating to the facts of the appeal. The findings made by the Judge were properly open to her on the basis of the evidence before her. The Judge was not limited to the matters raised in the reasons for refusal letter. The Judge properly considered all the evidence as a whole. The Judge was entitled to give little, if any, weight to the expert reports of Dr Thomas and Ms Young, for the reasons given. In all the circumstances, the Judge had demonstrated the correct approach to Article 8 and to the public interest considerations.

4. Following a renewed application for permission to the Upper Tribunal, Upper Tribunal Judge Plimmer granted permission to appeal on 11 May 2017, for the following reasons:

> "It is arguable, as contended in the grounds of appeal, that the First-tier Tribunal has unfairly found a sham EA marriage when the issue was not raised by the SSHD at the hearing.
>
> It is also argued that the First-tier Tribunal failed to address the submission that the appellant should be treated as a vulnerable witness.
>
> All grounds are arguable, albeit that some are stronger than others, and some may be no more than disagreements with robust, factual findings."

The Rule 24 Response

5. On 30 May 2017 a member of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. In summary, the respondent submitted that the Judge of the First-tier Tribunal had directed herself appropriately.

The Judge was plainly aware that submissions were made regarding the appellant being a vulnerable witness. This was a fact which the Judge had taken into consideration. However, in the light of significant discrepancies, inconsistencies and differing evidence, the Judge found that the appellant was not a vulnerable witness as claimed: see paragraph 19.

6. With regard to the Judge's findings on the alleged marriage, the Judge was entitled to have consideration to the evidence and the credibility of the appellant to assess the claim as a whole, given that such evidence had not been presented previously. The appellant had not challenged the refusal of her EEA application by lodging an appeal, so she was in effect making a fresh EEA application with the Tribunal acting as an initial decision-maker. Accordingly, all issues were live, and the burden was on the appellant to establish each facet of her case.

The Rule 25 Response

7. Ms Solanki settled the Rule 25 response on behalf of the appellant. She submitted that the finding made by the Judge at paragraph 19 of her decision was ambiguous. It was arguable that the Judge had accepted that the appellant was a vulnerable adult. It was difficult to know, as the Judge had not made a clear finding on this issue, in line with the guidance given in the Joint Presidential Guidance Note No.2 of 2010 - Child: Vulnerable adult and sensitive appellant guidance. The Guidance provides, *inter alia,* as follows:

> "14. Consider the evidence, allowing for possible different type of 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, by mental, psychological and emotional trauma or disability, the age, vulnerability, sensitivity of the witness was an element of that discrepancy or lack of clarity.
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> 15. The decision should record whether the Tribunal had 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 thus whether the Tribunal was satisfied whether the appellant had established his or her case with relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

The Error of Law Hearing

8. At the hearing before me to determine whether an error of law was made out, Ms Solanki developed the arguments advanced in the permission application and her Rule 25 response. On behalf of the Secretary of State, Mr Nash adhered to the Rule 24 response.

Discussion

9. I consider that the only grounds of challenge which have any merit are those which were singled out by Upper Tribunal Judge Plimmer. I consider that the remaining grounds amount to no more than an expression of

disagreement with findings that were open to the Judge for the reasons which she gave, subject to the two arguable errors of law identified in the grant of permission.

Marriage of Convenience

10. Since the appellant was advancing a human rights claim under Article 8 ECHR, the status of her marriage to "VP", a Greek national exercising Treaty rights in the UK, was a relevant consideration. The appellant relied on the family life which she had established in the UK with VP as a factor which militated against her return to Albania. If she had not in truth established family life with VP, because her marriage to him was a sham, this was highly material to an assessment of whether her prospective removal to Albania was proportionate from a family life perspective.

11. However, it has never been suggested that the appellant's application for an EEA residence permit was refused on the ground that her marriage to VP was one of convenience. On the evidence available to the Judge, the sole ground of refusal was insufficient evidence of VP exercising Treaty rights in the UK.

12. The reasoning of the Judge, which underpinned her finding that the appellant's marriage to VP was a sham, was as follows: (a) the appellant had not given a credible explanation for not directly appealing the EEA decision, rather than relying on her marriage to VP as "*a last-minute adjunct to a substantive asylum appeal*"; (b) VP had not attended the hearing, and had not given a credible explanation for his non-attendance; (c) his excuse that his new employer, Fast Despatch Transport Limited, would not give him time off work to attend the hearing was contradicted by an employment confirmation letter from Aqua dated 10 October 2016 which represented that VP would be working at Aqua until 25 October 2016; (d) the appellant's overall lack of candour and propensity to misrepresent her circumstances to achieve her ends; and (e) the speed at which the relationship with VP appeared to have developed, despite the appellant's claimed experiences of abuse at the hands of men in her past, including her own father and Coli.

13. It was open to the Judge to take the view that the above matters gave rise to a suspicion that the appellant's marriage to VP was one of convenience, but the Judge erred in law in deciding, of her own notion, that the appellant had in fact entered into a marriage of convenience with VP. Not only had the issue not been raised by the Secretary of State when refusing to issue the appellant with a residence permit, it was also not raised by the Presenting Officer at the hearing. The allegation was never put to the appellant so that she could rebut it. Moreover, the fact that it had not been raised as an issue in advance of the hearing meant that a fair hearing on the issue could not take place, as the appellant had not been given a proper opportunity to provide evidence in rebuttal. Thus, the

Judge's approach was non-compliant with the guidance given by the Court of Appeal in **Agho -v- Secretary of State for the Home Department [2015] EWCA Civ 1198** and contrary to the guidance given in **Kalidas (Agreed facts - best practice) [2012] UKUT 00327 (IAC)**, where the Upper Tribunal held that the Judges should look behind factual concessions only in exceptional circumstances. If the scope of the concession is unclear, or if evidence develops in such a way that it is extent and correctness need to be revisited, the Judge must draw that to the attention of representatives. An adjournment may become necessary. It does not appear that the Judge drew the attention of the representatives in the course of the hearing to a suspicion on her part that the marriage to VP was a sham.

Deciding whether the Appellant was a Vulnerable Witness

14. Turning to the other arguable error of law identified by Upper Tribunal Judge Plimmer, there has clearly been non-compliance with the guidance given in the Joint Presidential Guidance Note No.2 of 2010. The skeleton argument which Ms Solanki prepared for the hearing on 18 October 2016 shows that she raised the appellant's status as a vulnerable adult as a preliminary issue. She specifically requested the Tribunal to treat the appellant as a vulnerable adult in line with the Joint Presidential Guidance Note No.2 of 2010. When the Judge came to embark on her findings of credibility and fact, at paragraphs [12] onwards of her decision, she did not (as would have been best practice) begin by asking herself whether the appellant was a vulnerable witness.

15. It was only after she had made some adverse credibility findings, based on asserted inconsistencies in the appellant's account, that the Judge turned to address the evidence contained in Dr Thomas' psychiatric report.

16. The Judge gave cogent reasons for rejecting Dr Thomas' report, and for finding that the reason for the asserted discrepancies and inconsistencies in the appellant's account were simply that the appellant was being untruthful, and not because she was suffering from a psychiatric disorder or mental health issues, which made her reluctant to talk about her ordeal because of its traumatic effects on her.

17. However, justice must not only be done, but must be seen to be done. There has been a departure from the guidance given by the Court of Appeal in **Mibanga -v- Secretary of State for the Home Department [2015] EWCA Civ 367**. Although the Judge did not make the egregious mistake of leaving the psychiatric evidence to the end of her credibility assessment, she only sought to engage with the psychiatric evidence after she had already embarked on making adverse credibility findings based upon inconsistencies in the appellant's account, in circumstances where the inconsistencies in the appellant's account were (according to the psychiatric evidence) entirely consistent with her core claim being true.

18. There has been a parallel failure to recognise that the psychiatric evidence

has some independent probative value, as is illuminated by the Court of Appeal in **AM, R (on the application of) v Secretary for the Home Department [2012] EWCA Civ 521.** The Judge was wrong to discount Dr Thomas' report in its entirety on the basis that Dr Thomas had merely accepted uncritically the appellant's account. Dr Thomas' professional belief, following an expert examination and assessment of the appellant, constitutes independent evidence of the traumatic events described by the appellant. Dr Thomas is a Consultant Clinical Psychologist of 15 years' post-qualification experience. She observed that the appellant arrived for the interview in a state of heightened anxiety and distress, and that she was flustered and frightened. She shredded several tissues. She presented to her as someone who was extremely psychiatrically unwell. She presented with psychological symptoms of a severe major depressive disorder, and symptoms of complex PTSD, placing her at considerable psychiatric risk. Dr Thomas stated that it was common misperception that it was easy to fabricate a psychiatric disorder. She said it was actually extremely difficult to do so across time and symptom clusters, with consistency of effect.

19. It was open to the Judge to attach limited weight to the psychiatric evidence because, for example, Dr Thomas' opinion was based on only one examination: she had not assessed the appellant *"across time".* Alternatively, it was open to the Judge to accept that the appellant was a vulnerable witness, as indicated by the psychiatric evidence, but to find that any "*clear discrepancies in the oral evidence"* were not materially caused by a mental, psychological or emotional trauma or disability. But her method of resolving the issue of the appellant's asserted vulnerability (and the related question of the degree of weight to be accorded to the psychiatric report) was structurally flawed. I am unable to say with any confidence whether, if the Judge had followed the correct approach, she would or would not have accepted that the appellant was a vulnerable witness; and if she had accepted that the appellant was a vulnerable witness, whether and to what extent her adverse credibility findings against the appellant with regard to her protection claim would have fallen away.

Conclusion

20. The decision of the First-tier Tribunal contained an error of law, such that it must be set aside and remade in its entirety, with none of the Judge's findings of fact being preserved.

Directions

21. **This appeal is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing (Judge Swaniker incompatible). None of the findings of fact made by the previous Tribunal shall be preserved.**

22. **The anonymity direction previously made by the First-Tier Tribunal is continued.**

Signed Date 26 June 2017

Judge Monson

Deputy Upper Tribunal Judge