Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12657/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 June 2017	**On 12 July 2017**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

[I Z]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Sarwar of Counsel instructed by DV Solicitors
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision to refuse a protection claim. First-tier Tribunal Judge Phull dismissed her appeal in a decision promulgated on 25 January 2017. The judge rejected the credibility of the appellant's account and concluded that she would not be at risk if returned to Zimbabwe.

Decision and Reasons

2. The appellant seeks to appeal the First-tier Tribunal decision on two grounds. Firstly, that the judge failed to assess the case properly in accordance with the principles outlined in paragraph 339L of the Immigration Rules, which transposed Article 4 of the Qualification Directive. Secondly, the judge failed to give adequate reasons for apparently rejecting the evidence of the second witness, [M].

3. In relation to the first ground of appeal it is clear the judge referred to paragraph 339L of the Immigration Rules at paragraph 12 of the decision insofar as it assists a judge to make a credibility assessment. However, having made that reference there is little to show that the judge then went on to conduct her assessment of the appellant's credibility in accordance with the principles set out in paragraph 339L. It was of course open to the judge to take into account any apparent inconsistencies in the appellant's account insofar as paragraph 339L requires an applicant to make a genuine effort to substantiate an asylum claim. It was also open to the judge to take into account any circumstances in which she thought evidence could reasonably have been produced in support of the claim.

4. In paragraphs 15 to 18 of the decision the judge makes a series of findings relating to the factual basis of the claim. In each paragraph she notes that no evidence had been produced to support that aspect of the claim. It seems that that lack of evidence became the main reason for rejecting the appellant's account. Whilst it was open to the judge to note that further evidence could have been produced in support of the claim, what is lacking from the decision is any assessment of whether what was produced was sufficient to meet the low standard of proof. There is no assessment of whether the appellant's account was generally consistent, either internally or with the background evidence relating to the circumstances in Zimbabwe. I also note that there is some confusion in the application of the standard and burden of proof in paragraphs 14 and 17. In the last sentence of paragraph 14 the judge stated:

> "I therefore find to a reasonable degree of likelihood that the appellant does not have a significant MDC profile because there is nothing in her evidence to suggest that as a member of the MDC she had problems personally or conducting her business in Zimbabwe."

5. In paragraph 17 of the decision the judge considered the appellant's evidence relating to the reports that she made to the police of her uncle's death in 2009. The appellant also claimed that subsequently she received threatening telephone calls, which she reported to the police. The judge concluded:

> "I find that although the appellant claims to have received threatening telephone calls and says that she reported the matter to the police many times, she has not filed any evidence of these complaints and I find this is

because there is a reasonable likelihood these incidents have not occurred as claimed."

6. There is a fine line between a judge being able to take into account an appellant's failure to produce evidence that could reasonably have been produced and applying too high a standard of proof. If the decision is read as a whole, in my assessment, the judge required a higher standard of evidence than is required to make out an asylum claim. The two paragraphs I have highlighted also indicate that the judge may have muddled the application of the standard of proof. It is not for the judge to decide to a reasonable degree of likelihood that an appellant does not have a significant MDC profile or that incidents did not occur to the standard of a reasonable degree of likelihood. What is required is a holistic assessment of all the evidence to decide whether the evidence before the judge is sufficient to meet the low standard of proof. For these reasons, I accept that there is an error of law in the judge's decision relating to the first ground.

7. I can deal with the second ground fairly briefly. [M] provided a witness statement in support of the appellant's case. She also attended the hearing to give evidence. It is said that she is related to the appellant. She is the daughter of the appellant's uncle. It was not disputed that [M] has been recognised as a refugee. A copy of her interview records or initial witness statements made in support of her original asylum claim would have shed light on the reasons why she was found to be a refugee and may have assisted the appellant's case. It was open to the judge to note that this was evidence that could reasonably have been produced. However, what seems clear from the finding in paragraph 16 of the judge's decision is that there is no analysis of [M]'s evidence. I am told by counsel who attended the hearing that [M] was called to give evidence but was not cross-examined. This would appear to be borne out by the judge's record of proceedings on file.

8. In her witness statement [M] confirmed that she was aware that, together with her mother, the appellant witnessed the assault on her father four days before his death. She also said that she was aware that the appellant was nearby at the time when her father died. She was also aware that the appellant had given information to the police and subsequently received threats.

9. Given that [M]'s evidence was unchallenged it was incumbent on the judge to make findings relating to her evidence. The only place in which the judge deals with her evidence is at paragraph 16 of the decision. It not clear whether the judge accepted her evidence or not. If she accepted her evidence it is unclear what weight she placed on it. If she did not accept her evidence, there is no reasoning to explain why. For these reasons, I find that the second ground is also made out. Both parties agree that as a consequence the decision should be set aside and the appropriate course of action is to remit the appeal for a fresh hearing before the First-tier Tribunal.

10. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of an error on a point of law.

DECISION

The First-tier Tribunal's decision involved the making of an error on a point of law

The decision is set aside

The appeal is remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 11 July 2017

Upper Tribunal Judge Canavan