**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/03735/2017**

**THE IMMIGRATION ACTS**

| **Heard at North Shields** | **Decision & Reasons Promulgated** |
|---|---|
| **On 5 April 2018** | **On 16 April 2018** |

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**
**DEPUTY UPPER TRIBUNAL JUDGE D G ZUCKER**

**Between**

**MB**
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms L Brakaj, Iris Law Firm (Gateshead)
For the Respondent: Mr Diwyncz, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is national of the Republic of Congo where she was born in 1981. We continue the anonymity order made by the First tier Tribunal (FtT) whose decision she appeals. Accordingly, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the disclosure or publication of any matter likely to lead members of the public to identify the appellant or her children is prohibited. The appellant will solely be referred to in these proceedings as MB. Failure to comply with this order may result in contempt proceedings.

2. We asked whether Ms Brakaj wished us to treat the appellant as a vulnerable witness. She did so based on the medical evidence that had been provided to the FtT. The hearing proceeded in private during which the appellant was accompanied by a friend Ms Sharky from Corpus Christie Church. We also explained to appellant how the hearing would proceed and, although no interpreter was present, she appeared to understand matters in basic terms at least.

3. In the course of submissions, it was accepted by Mr Diwyncz that the decision of Judge Kempton was infected by material error and accordingly we set aside her decision and remit the case to the FtT for its reconsideration of the appeal. Mr Diwyncz was correct to concede the appeal as, in our own view, the decision could not be sustained. Our reasons are as follows.

4. The background is that the appellant who has been a regular visitor to the UK sought protection on the basis that she feared persecution by the authorities on account of her political opinion. This was expressed by her support for a candidate (Mr Mokoko) in the 2016 elections by distributing leaflets and by providing food parcels to her father who lived in an area said to be peopled by the Ninja who have a history of violent opposition to the government. By sending him food parcels, the appellant was considered to be Ninja herself, something that she denies. This adverse attention resulted in a summons to attend the police in April 2016 and her arrest in September when she was detained and raped.

5. The FtT Judge disbelieved the account as "incredibly muddled" and set out her conclusions as follows

> "40. The appellant's position is that she was persecuted on account of her political involvement and the subsequent accusation of supporting the Ninjas.
>
> 41. However, her account is incredibly muddled. It was only in the oral evidence that she said that she was in fact at the police station in April and questioned in connection with her political activities (albeit at low level). However, the fact that this did not appear in either interview, her representatives letter of corrections or her subsequent statement does not assist her. It is not good enough to say that she was told at the screening interview to save up the detail for the asylum interview. It is not good enough to say that she was not asked about the matter in the asylum interview or even by her solicitor for the statement. It is up to her to put forward her case and she has not done so in a coherent manner.
>
> 42. I do not accept that the appellant has had some sort of trauma at some point which is documented in the medical evidence, but its causes have not been proved.
>
> 43. The police summons dated 6 April to attend on 2 April does not make sense and smacks of being a non-genuine document. Why would a summons to attend be sent after the date when the attendance is to be made? Clearly the appellant's family are willing to report her missing to the authorities in Congo (as she

says they are still looking for her). Her family, according to her account, know perfectly well that she is out of the country and must know she is in the UK given her visa for here and having an uncle here. She has not contacted anyone in Congo about the current position for her there. She was a person who was apparently working for a multi-national company, Halliburton, and one might have thought that she could even contact someone at work rather than her family direct in order to find out the current position. There is nothing from her employer to say that she has gone absent without leave.

44. While I appreciate that Congo is not blessed with a democratically elected government (irregularities in the March 2016 election are detailed on pages 30 to 31 of the appellant's bundle), the appellant has not proved that she was detained in April and then released after questioning. She has also not proved that she was detained in September 2016 and released irregularly.

45. There are also the inconsistencies in her evidence about being married, having a partner or being single as stated in the visa application. She has not given a proper account or chronology which she could have done. I do not accept that she did not have sufficient time with her solicitor, as her solicitor has provided a very detailed letter to the home office after the interview and also a detailed statement for the hearing, which responds to the reasons for refusal letter. What the appellant has not provided is a candid statement of evidence in her own words of what her story really is. She just reacts to questions put to her. She does not volunteer information. I appreciate that the appellant was upset during the interview and something has clearly happened to her but she has not proved that it happened in the manner she alleges. She has not proved that she has been persecuted on account of her imputed (Ninja support) or actual (support for Mr Mokoko) political opinion. Accordingly, she does not engage the Refugee Convention."

6. The grounds of challenge are twofold and are paraphrased as follows

(i) It was not clear whether the correct burden of proof was used and there was no consideration of whether the benefit of the doubt "ought to be afforded in all the circumstances" in the light of the acceptance that something had happened to the appellant. No reason had been given why the account of rape and the sexual abuse of her daughter had not been accepted and to blame the appellant for a lack of coherence was a "procedural and legal flaw in the assessment of the evidence of a vulnerable witness.

(ii) The judge had failed to resolve an issue regarding the summons that had been produced; the original showed the date for attendance clearly 8 April not 2 April.

7. We began our consideration with the second ground. The file contains a translation requested by the solicitors of the summons (Convocation) dated 6 April that clearly shows that attendance was required on 2 April. Our initial view was that the judge could not be held to account over this as she quite properly relied on a translation that had been produced. It

emerged however that the appellant was asked about the whereabouts of the original at the hearing and responded that it was with her solicitors. Mr Diwyncz explained that it had been in the respondent's file and accepted that it was not disclosed. He accepted that had it been, the error in the transcription of the date might have been picked up. There is no suggestion that the original was deliberately held back and unsatisfactorily, it is unexplained why the appellant's solicitors did not alert the judge to its actual whereabouts. We saw the original ourselves and it is clear that, although feint, the date for attendance was 8 April but this had appeared as 2 April on the copy on which that translation had been based. Mr Diwyncz accepted that this procedural error was material and for this reason alone the decision could not stand.

8. Returning to the first ground, Ms Brakaj accepted that the judge had correctly directed herself as the burden and standard of proof as recorded in paras [6] to [8]. We reminded her of the Tribunal's decision in *KS (Benefit of the doubt)* [2014] UKUT 552 (IAC) as to the correct treatment and status of benefit of the doubt as set out in the headnote

> "(1) In assessing the credibility of an asylum claim, the benefit of the doubt ("TBOD"), as discussed in paragraphs 203 and 204 of the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, is not to be regarded as a rule of law. It is a general guideline, expressed in the Handbook in defeasible and contingent terms.
>
> (2) Although the Handbook confines TBOD to the end point of a credibility assessment ("After the applicant has made a genuine effort to substantiate his story": paragraph 203), TBOD is not, in fact, so limited. Its potential to be used at earlier stages is not, however, to be understood as requiring TBOD to be given to each and every item of evidence, in isolation. What is involved is simply no more than an acceptance that in respect of every asserted fact when there is doubt, the lower standard entails that it should not be rejected and should rather continue to be kept in mind as a possibility at least until the end when the question of risk is posed in relation to the evidence in the round.
>
> (3) Correctly viewed, therefore, TBOD adds nothing of substance to the lower standard of proof, which as construed by the Court of Appeal in Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449, affords a "positive role for uncertainty".
>
> (4) The proposition in paragraph 219 of the Handbook, that when assessing the evidence of minors there may need to be a "liberal application of the benefit of the doubt" is also not to be regarded as a rule of law or, indeed, a statement of universal application. As a reminder about what the examiner should bear in mind at the end point of an assessment of credibility, the proposition adds nothing of substance to the lower standard of proof. If, for example, an applicant possesses the same maturity as an adult, it may not be appropriate to resort to a liberal application of TBOD.
>
> (5) Article 4(5) of the Qualification Directive is confined to setting out the conditions under which there will be no need for corroboration or "confirmation" of evidence. Although (unlike the Handbook)

> Article 4(5) does set out conditions that are rules of law, properly read, it is not to be compared with the scope of TBOD as described above."

9. We find more force in the second limb of this ground although it is poorly expressed. The judge did not have an easy task in this case. On any reading of the medical evidence the appellant had faced difficulties in giving her account of rape to the health professionals. This should have alerted her advisers and we reminded Ms Brakaj of the guidance and matters considered in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123 in particular paragraph 32

> "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."

10. Ms Brakaj accepted that there had been no steps taken in accordance with the guidance above and she acknowledged this should have happened. She further acknowledged that a medial report in all the circumstances was desirable and should have been provided. She further accepted that a detailed statement by the appellant should have been produced but nevertheless maintained that there was enough before the judge in order to determine the case. We have some difficulty in reconciling that latter position with the acknowledgment by Ms Brakaj as to the former. On any basis, the judge was in a difficult position having regard to the poor preparation for this case and the absence of initiative by the appellant's solicitors to raise the issue of vulnerability. Unfortunately, these difficulties were compounded by the judge in her approach to the evidence. Putting on one side the tone of the language used by the judge in reaching her conclusions ("it is not good enough to say "…" it is up to her to put forward her case" …" she does not volunteer information") the core difficulty is that although the judge accepted the appellant had had some sort of trauma she failed to consider the impact of this on her ability

to give a coherent account of her problems. The only evidence before the judge of that trauma was the appellant's account of rape and the assault on her child which she had alerted the medical team on first consulting the general practitioners as recorded in a letter from the specialist TB nurse dated 23 February 2017. It is also a matter that the appellant was dissuaded from developing further in the course of her initial contact interview. Thus, it was not something that had only be introduced at a late stage.

11. The judge explained that she had appreciated the appellant was upset and that something had clearly happened to her. However, in deciding that she had failed to prove that it had happened in the manner alleged the judge failed to ask the critical question which is whether the poor account could be attributable to that trauma and to decide the nature of that trauma. Had the judge the benefit of a medical report that may well have assisted in the enquiry. That report might also have considered the ability of the appellant to give a coherent account of her experiences. It was open to the judge to call for a report in the absence of the failure by the representatives to do so but this does not appear to have been considered. Ultimately the question is whether the appellant had a fair hearing. We are not persuaded that she had and the findings based on what was said and before the judge at the hearing cannot therefore be upheld quite apart from the difficulties that came about as a result of the procedural irregularity regarding the summons.

12. The representatives are now better informed as to how they should prepare for the forthcoming re-making of this decision in the FtT. With the consent of the parties the decision of the FtT is set aside and the matter remitted to it for further consideration.

Signed Date 13 April 2018

Upper Tribunal Judge Dawson