



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/09939/2018

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 29 April 2019**

**Decision and Reasons  
Promulgated  
On 02 May 2019**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**AB  
(Anonymity direction made)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr J Greer instructed by Virgo Solicitors.

For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Moxon ('the Judge') promulgated on 10 October 2018 in which the Judge dismissed the appellant's appeal on both protection and human rights grounds.

## **Background**

2. The appellant, a citizen of Albania born on 14 February 1997, claimed asylum on 26 January 2015 which was refused by the respondent. The appellant asserted she is the victim of human trafficking and fears her traffickers and her family if returned to Albania. At [32] the Judge writes:
  - “32. I agreed at the outset of the hearing to treat the Appellant as vulnerable and ensured that she was comfortable and that she knew that she will be permitted breaks where required. I reassured her that she would be questioned appropriately and fully explained the procedure to her. Whilst Mr Greer in his closing submissions argued that I had found the Appellant “a sensitive witness” this was a misunderstanding as I had simply stated that I would treat her as a vulnerable witness, as was appropriate unless and until I was to find otherwise, and was not communicating a finding of fact.”
3. The Judge sets out findings from [47] leading to the appellant’s credibility being rejected. The appellant sought permission to appeal on 6 grounds being (i) committing procedural irregularity capable of affecting the fairness of the proceedings relating to the applicability of the vulnerable witness guidance, (2) giving undue weight to be relevant matters referring to the Judge’s comments concerning the absence of corroborative medical evidence, (3) giving undue weight to a relevant matters by reference to the appellant’s demeanour, (4) in failing to give adequate reasons relating to the Judge’s findings as to the plausibility of the appellant’s account, (5) giving undue weight to irrelevant matters by reference to purported inconsistencies in the appellants evidence, and, [6] in failing to resolve a material dispute between the parties regarding the value of the British Embassy letter.
4. Permission to appeal was granted by another judge the First-Tier Tribunal on all grounds on 7 November 2018.

## **Error of law**

5. Ground 1, asserting procedural irregularity, refers to the Joint Presidential Guidance Note No 2 of 2010 and the guidance contained therein in relation to the manner in which evidence given by a vulnerable witness should be taken and assessed. The appellant also refers to the decision of the Court of Appeal in AM(Afghanistan) [2017] EWCA Civ 1123 in which it was found that the guidance is mandatory in nature and that a Tribunal’s failure to apply the guidance and applicable cases is likely to amount to an error of law.
6. The grounds assert the Judge has erred in law in relation to this ground for the following reasons:
  - “6. At the beginning of the hearing, the Appellant’s advocate raised the applicability of the guidance as a preliminary

issue, making an application that the guidance be applied in the case. The Judge Moxon granted that application, or at least indicated to the parties that he had granted the application. However at [32] of the determination, Judge Moxon states that he had not *actually* granted that application but only that he would treat the Appellant *as if she were* a vulnerable witness unless or until he found otherwise. If this was the approach to be taken, it ought to have been communicated to the parties at the hearing rather than in his written determination, following the hearing.

7. Judge Moxon notes that the Appellant's advocate proceeded on the understanding that the guidance was to apply but that this was a misunderstanding. If Judge Moxon had detected that his ruling had been misunderstood, the appropriate time to raise this was during the hearing rather than to allow the parties to labour under a misapprehension. Such an approach is procedurally unfair and wrong in law.
8. The absence of corroborative medical evidence appears to be the sole basis for Judge Moxon disapplying the Vulnerable Witness Guidance, at [51]. Despite the self-direction at [52] of the determination, Judge Moxon deprives the Appellant of any practical benefit of the guidance and declines to apply the guidance in substance. For example, the focus upon demeanour, minor inconsistencies in the Appellant's account and the Appellant's ability to recount matters that occurred when she was a child is contrary to the Guidance.
9. Judge Moxon's failure to contentiously apply the provisions of the guidance amounts to an error of law."

7. At [51] the Judge wrote:

"51. I note that despite the assertion of the Appellant suffering low mood and potential suicidal ideation, she has failed to maintain counselling and does to rely upon a report from suitably qualified practitioner about her mental health. I consider this to be a material omission in light of the fact that it is asserted that she suffers mental health problems arising from trauma and is vulnerable. Whilst I accept that the Appellant does not wish to relate matters, which is plausible, she nevertheless has been able to disclose information to her General Practitioner, Home Office interviewers, legal representatives and Ms Read and I do not accept that there is adequate explanation why she has not sought the continued assistance of medical professionals or to obtain a report."

8. The Judge sets out matters found to be relevant to the adverse credibility findings from [54] in which the issue of inconsistency in the account is raised as is the finding relating to implausibility.
9. At [54 (d)] the Judge finds:

“54(d) It is not credible that her captors would make such effort to prevent her escaping that she will be accompanied by two bodyguards, but that they would then leave the route of escape unsupervised and either unlocked or with the key left in the door. It is not credible that she would be permitted to retain tips or that she would not be searched for money, especially given that she asserts that she was not permitted to keep her passport. It is not credible that one client would give such a substantial tip.”

10. The appellants challenges this finding, particularly relating to the €500 tip, as the source of the Judge’s apparently authoritative knowledge of the tipping habits of men who pay for sex or the security arrangements of imprisoned enslaved women was not disclosed on the face of the determination making it unclear on what basis the Judge concludes this aspect of the appellants evidence lacks plausibility; which is said to be an approach infected by lack of adequate reasoning.
11. The grounds also referred to what is said to be factual error in the finding at [54 (a)] in which the Judge criticises the appellant for giving an inconsistent account of her age when she left school when there was no dispute between the parties as to the appellant’s age and it was unclear on what basis the Judge concludes that such inconsistency goes to the core of the appellant’s account. It is also said in the same paragraph that the Judge criticises the appellant on the basis that Ms Read, a therapist, incorrectly recorded the appellant had 4 brothers without explaining how a typographical error in a third party report could impinge upon the appellants credibility and in failing to take into account that the appellant’s solicitors wrote to the author of the report correcting the error shortly after the appellant had first sight of the document, as evidenced at page 170 of the appellant’s appeal bundle, which it is said the Judge has failed to take into account. I find such criticism made out.
12. It is also the Judge’s findings at [54(e)] in which the Judge concludes the appellant has given inconsistent evidence relating to the paternity of her eldest child, despite accepting the appellant was consistent between her Home Office interview and evidence given to the First-Tier Tribunal, is irrational. The purported inconsistency is with her medical notes which was not a point taken against the appellant by the respondent or put the appellant at the hearing. It is also stated the finding at [52(h)] in which the Judge criticises the appellant for being unable to provide an adequate explanation for how she came to hold a false Italian identity card is wrong as at question 189 of her Asylum Interview the appellant indicated how she came into the possession of such document. It is also noted at [49] that the appellant has given a broadly consistent and plausible account. I find such criticism made out.
13. Mr McVeety on behalf of the Secretary of State accepted that although in relation to some aspects of the grounds he would argue there was no error material to the decision to dismiss the appeal he accepted that in relation to ground one the Judge had erred in law.

14. The Judge clearly at [32] indicated that it was agreed that he would treat the appellant as a vulnerable witness which meant the Judge was required to not only treat the appellant in accordance with the published guidance but also to assess the evidence on the same basis. An arguable difficulty in approaching the assessment of the evidence in a different manner is that it is only once a proper assessment of the evidence is made that it can be established whether the appellant is a vulnerable witness or not. The vulnerability in this case arises as a result of the allegation of the appellant being a victim of trafficking and a person with mental health issues.
15. What does not appear in the body of the determination evidence of the manner in which the Judge assess the appellant's evidence by specific reference to the Joint Presidential Guidance Note. There appears nothing within the Judge's assessment of the weight to be given to the evidence indicating how the appellant's vulnerability was factored into the fact-finding process. Absence of corroborative evidence relating to medical conditions is insufficient to disapply the Vulnerable Witness Guidance without more. The Judge seems to find that the lack of corroborative evidence undermined the appellant's claim to be suffering mental health issues and that if she was not suffering mental health issues she was not a vulnerable witness which is arguably in conflict with the finding that the material provided warranted the appellant being treated as a vulnerable witness. There was evidence before the Judge from other sources relating to the appellant's mental health issues including witness evidence.
16. The Judge also considering the appellant's difficulty in giving evidence as evidence of her evasiveness which is also said to be at odds with the Vulnerable Witness Guidance and established case law; neither is demeanour a basis for judging an individual's credibility as a witness. The Judge's assertion the appellant's responses were evasive is not adequately reasoned and at [13 - 14] of the grounds the appellant sets out verbatim questions asked of the appellant and replies concerning her passport which do not appear on the face of them to be evasive. The appellant at the date of interview was 17 and therefore a child.
17. In light of the respondent's acceptance concerning the approach of the Judge to the assessment of the evidence leading to arguably unsafe conclusions, arising from the apparent failure to properly apply the Guidance, I find the decision must be set aside on the basis of procedural irregularity sufficient to amount to material error of law. Failure to properly apply the guidance on the facts of this case make the Judge's conclusions arguably unsafe and unsustainable.
18. The challenge to the weight given by the Judge to the letter from the British Embassy has no arguable merit as such evidence is admissible and should not be accepted or rejected because it comes from diplomatic sources but should be considered as part of the evidence as a whole.
19. As the manner in which the evidence has been considered by the Judge is flawed, the need for a proper assessment of the evidence in

light of the Joint Presidential Guidance involving extensive fact-finding, and in light of there being no preserved findings this is a case, it is wholly appropriate for the appeal to be remitted to the First-Tier Tribunal sitting at Bradford to be reheard by a judge other than Judge Moxon in accordance with the guidance relating to the remission of appeals.

20. It may be the outcome is the same, but this cannot be found to be so until there has been a proper assessment of the evidence - *AM (Afghanistan)* [2017] EWCA Civ 1123 considered.

### **Decision**

21. **The Judge materially erred in law. I set aside the decision of the Judge. I remit the appeal to the First-Tier Tribunal sitting at Bradford to be heard by a judge other than Judge Moxon nominated by the Resident Judge. Case management directions shall be issued by the First-Tier Tribunal in accordance with the operational needs of the Bradford Hearing Centre upon receipt of the file.**

Anonymity.

22. 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 29 April 2019