Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03745/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2020	**On 29 January 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

S J
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr R Jesuram, of Counsel, instructed by Hounslow Legal Services
For the Respondent:	Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Keith on 11 December 2019 in respect of the determination of First-tier Tribunal Judge E B Grant, promulgated on 1 April 2019 following a hearing at Hatton Cross on 19 March 2019.

2. The appellant is an Indian national born on 24 January 1982. She claims to be a Muslim. She entered the UK with entry clearance as a Tier 4 student on 13 June 2010. On 12 December 2012, she applied for Tier 1 leave, but this was refused on 26 June 2013 and her appeal was dismissed. A copy of that determination has not been adduced. The appellant's appeal rights were exhausted on 1 April 2014; she then made a Tier 4 application which was refused on 15 July 2014 with no right of appeal. On 27 March 2015, as she had failed to embark, she was served with enforcement papers. She then claimed asylum. Two interviews were arranged but she failed to attend either one. I am told that the asylum application was treated as abandoned due to her non-attendance. In her witness statement, the appellant blamed her representatives for advising her not to attend. At the hearing before Judge Grant, she confirmed she, nevertheless, did not wish to pursue an asylum claim. On 26 August 2015 she sought leave to remain on private life grounds. That was refused on 15 February 2017. The appellant then gave notice of appeal.

3. The appeal was listed for hearing on 17 April 2018 at Hatton Cross. The appellant sought a transfer of the venue on the basis that she had moved to Yorkshire. The request was granted but the follow up notification sent by the Tribunal to the appellant's alleged new address was returned marked "not at this address since May 2017". When the new date was set at the centre requested, the appellant's representatives sought a transfer back to Hatton Cross on the basis that she was living in Hounslow. The appeal hearing had to be adjourned yet again and it was then relisted at Hatton Cross on 19 March 2019.

4. The appellant claims to come from a very strict, conservative and religious Muslim family. Her claim is that she nevertheless managed to receive an education, attend college and have a secret affair with a Hindu man which led to her "secretly" giving birth whilst unconscious in a property her lover had arranged for them in the weeks leading to the birth. She claims that when she regained consciousness, her lover told her that the baby was stillborn. Years later after she had come to the UK to study and been reunited with her partner who had also come here, she discovered that he had given the baby to his family so that the child could be raised as a Hindu. That soured their relationship but, meanwhile, she had another child in the UK whose paternity she was unsure of. She, nevertheless, remains involved with her Hindu partner. No information or evidence of his immigration status has been offered and there is no supporting evidence from him. She claims that she cannot return to India because she would be killed by her family for refusing to a marriage they had arranged and for having illegitimate children. She also claims that her son is stateless and that she is interested in Christianity. She denies having used deception in an ETS test in 2012.

5. Judge Grant heard the appeal but found the entire claim to be lacking in credibility. Accordingly, the appeal was dismissed.

6. The grounds for permission to appeal essentially argue that the judge was not a medical expert and so *"cannot comment on the circumstances of the appellant's birth"* (sic) and cannot dismiss the medical evidence with respect to the appellant's health. It is argued that the judge's decision was irrational and failed to give adequate reasons for rejecting the claim. Reliance is also placed on the grounds to the First-tier Tribunal which repeat the same complaints but also include criticisms on the judge's other findings of fact and failure to consider the best interests of the appellant's son.

The Hearing

7. The appellant attended the hearing at which I heard submissions from the parties. It has to be said that Mr Jesuram's submissions vastly expanded on the grounds put forward almost to the extent that they changed the basis on which the challenge was brought.

8. Mr Jesuram's first point was that the judge had raised a dispute over the account of the birth of the child (in India) which had never been disputed by the respondent and had failed to put the point to the appellant at the hearing. It was not for the judge to go behind unchallenged evidence. The issue had not been the subject of cross examination and the appellant was not given the opportunity of rebuttal. He also argued that the judge had wrongly recorded (at paragraph 36) what the appellant had said in her statement. He next submitted that the judge had failed to consider the Presidential guidance on vulnerability and had failed to analyse how the appellant's vulnerability as a person with mental health issues impacted on her evidence. He submitted that the correct approach was to consider the medical evidence and the guidance on vulnerable witnesses before considering the evidence, rather than the other way around. He complained that this was a Mibanga (2005 EWCA Civ 367) error.

9. Mr Jesuram also submitted that there had been no consideration of the best interests of the appellant's son; this was particularly important because of the appellant's mental health.

10. He argued that the judge's findings on the ETS issue were also flawed. At paragraph 54, it was plain that the judge had already concluded that the appellant was dishonest and had then applied that conclusion to the ETS decision. The findings might have been different had the correct approach been followed. The respondent had to show that the burden on her had been discharged and the appellant's innocent explanation had to be considered. Moreover, the judge's comments about 100% of the tests (at paragraph 53) did not accord with the evidence of 88% of tests being invalid.

11. Mr Jesuram conceded that the argument over the statelessness of the appellant's son was not made out.

12. In response, Mr Tufan pointed out that the judge's findings on the ETS matter started at paragraph 47 of the determination. He referred me to MA (ETS – TOEIC testing) [2016] UKUT 450 (IAC) and to what the Presidential panel said about the Look Up Tool (at 51 and 52). He pointed out that 100% of the test results had not been released at the appellant's college. The judge had also considered the Façade report and the appellant's language ability (at 52 and 51 respectively).

13. Mr Tufan submitted that the arguments now made on vulnerability had not been made to the First-tier Tribunal. He submitted that the medical reports were very short documents, fell short of meeting the guidance for medical reports given in JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) and were based on an acceptance of what the appellant had said. He submitted that the Mibanga point was clarified by the Court of Appeal in S (Ethiopia) [2006] EWCA Civ 1153. He submitted this was a case where Judge Grant had not fallen foul of "*that artificial separation and structural failure which were found to exist in Mibanga*" (at 24). Moreover, the medical evidence in Mibanga was very powerful; in the present case it was not.

14. On the issue of the birth of the appellant's daughter, Mr Tufan submitted that the judge had considered the evidence and made a finding which was open to her based on life experience. Her conclusion that the claim was preposterous was not irrational. Her partner had not given evidence to support her claim and there was no statement from him. The evidence was before the judge and she was entitled to make findings on it.

15. Mr Jesuram replied. He submitted that medical evidence corroborating a claim of torture in an asylum appeal was different to the wider scope of evidence in an immigration case. He submitted that the first consideration was whether a witness' evidence was impaired by a mental health condition. He referred me to AM (Afghanistan) [2017] EWCA Civ 1123 and argued that the appellant should have been considered as a vulnerable person. If there was any dispute as to the medical diagnosis, it should have been put to the witness. It was not appropriate for fact finders to make decisions on matters not put to an appellant especially where the appellant was vulnerable.

16. On the ETS issue, Mr Jesuram submitted that all that was known about a person's ability should be considered before a decision was made on credibility. The appellant had taken a Pearson test in 2014 and that supported her claim to have a command of English. The judge should have taken account of that. The problem was that the judge had reached her conclusions on credibility and then rejected the ETS matter.

17. He argued that there were multiple reports all reaching the same conclusion about the appellant's vulnerability. Consideration of the appellant as a vulnerable witness was not subject to an application being made to treat her as such. It was not surprising the appellant's partner was not called to give evidence as the appellant was unsure whether her UK born child was his. The determination was unfair and the matter should be remitted for a fresh hearing. The appellant now had received DNA evidence to show that her partner was not the father of her son. That was a matter that required further fact finding.

18. In answer to an enquiry I made of the parties, I was told that the appellant's asylum claim had been treated as abandoned following her non-attendance at the two arranged interviews.

19. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

20. I have considered all the evidence before me and have had regard to the submissions made and the authorities referred to. I reach my decision only after having considered the evidence as a whole.

21. Dealing first with the issue of the appellant's vulnerability and the judge's failure to apply the guidance on vulnerable witnesses, I note that the appellant has been legally represented throughout the proceedings, that she was represented by Counsel at the First-tier Tribunal hearing and that there was no suggestion at any stage that the appellant should be treated as a vulnerable witness. It has to be said that Mr Jesuram made much of her mental health and it is difficult to accept that were the appellant as mentally unstable and vulnerable as is claimed, that her representatives and previous Counsel would fail to make any representations or submissions on this point. Indeed, the First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses Practice Direction and the Presidential Guidance Note both point out that responsibility for identification of a vulnerable witness rests with the appellant's representatives. The appellant's witness statements prepared with the assistance of her representatives fail entirely to indicate that any special adjustments were made for the taking of her evidence to prepare the statements and there were no requests for her to be treated in any special way when she gave oral evidence at the hearing. It was not maintained by Counsel at the hearing before Judge Grant that the appellant was incapable of giving evidence or that the evidence given may be adversely affected by the anxiety and depression she is said to have. Nor is there any reference at all in her application to the respondent or in her witness statement to the claim (made to the Watford Rape Crisis and others in the UK) that she attempted to hang herself in India after she told her partner

of the abuse she had suffered from a family member and he had become violent towards her.

22. The most recent medical letter is dated 12 March 2019. It confusingly refers to the author having seen the appellant with her 10 month old son although in March 2019 the child would have been some 17 months old, having been born in October 2017. It confirms that the appellant has denied any suicidal intent and confirms that any risk of self-harm is low and that she has capacity. The author finds that her immigration case is causing her stress and that removal would cause her mental health to deteriorate, although no reasons are provided. The author does not appear to have considered the appellant's ability to return with her partner and son.

23. A letter from the West London NHS Trust dated 1 March 2019 states that the appellant was of low mood in April 2018, had attended therapy, had described high levels of anxiety and fear at being removed and indicated that she would end her life if she had to return as she would feel unsafe. Again, there has been no consideration of the fact that the appellant could return with her partner. The same is the case with an earlier letter from the Trust of February 2018.

24. I have considered AM (Afghanistan) on which Mr Jesuram relied, and which gave guidance on the general approach to be adopted by the Tribunal where claims for asylum were made by children, young people and other incapacitated or vulnerable persons whose ability to participate effectively in proceedings might be limited. In that case the appellant was as 15 year old asylum seeker with learning difficulties and there was a medical report which outlined the ground rules which should be adopted at the hearing to ensure procedural fairness. The judge ignored the advice and made adverse credibility findings. That scenario was entirely different to the present situation. As I have already said, there was no suggestion by the appellant's solicitors or Counsel that she was incapacitated, that her ability to participate effectively in her appeal hearing was impaired in any way, or that she may give incoherent evidence as a result of her anxiety.

25. It was found in AM that "*the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who … 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" (at 32). Nothing in the evidence before the judge suggested that any such approach was taken by the appellant's representatives or Counsel.

26. In all the circumstances, Judge Grant was not in error in 'failing' to consider the guidelines on vulnerable witnesses. It not being suggested that she was such a person, and there being no sign during the course of the hearing that she had problems in any way in her ability to participate and recount her evidence, the judge was not required to consider her as a vulnerable person. Unlike the situation in AM, the judge did take the various letters into account. Unfortunately, for the appellant they raise further issues, which I shall come on to later.

27. It is also important to note that at no stage has the appellant maintained that any of the evidence she has given was adversely affected by her state of mind, nor that she had forgotten to mention any events or that she had provided incorrect information. There been no attempt to correct any part of it. Further, Mr Jesuram did not explain how any of the judge's findings could have differed even if she had accepted the appellant to be a vulnerable witness, given that those findings were based on the appellant's confirmed evidence.

28. Mr Jesuram submitted that the judge's approach to credibility and the medical evidence was flawed because she had reached her conclusions and then considered the evidence. He further submitted that the adverse credibility finding was then applied to the consideration of the issue of deception over the TOEIC certificate. This submission disregards wholly what the judge stated at the commencement of her findings at paragraph 34. There, she confirms that she has reached an adverse decision and then proceeds to set out all her reasons in the following paragraphs (35-62). It is, therefore, not the case that she considered the evidence after reaching a conclusion and certainly not a Mibanga point as was argued. The judge did not reach a negative assessment of credibility and then ask whether that assessment was displaced by other material. There was a holistic assessment and the letters from the therapists were not treated as an "*add on*" nor were the contents rejected as a result of an adverse credibility assessment made prior to and without regard to that evidence.

29. In the case of S (Ethiopia), referred to by Mr Tufan, the court pointed to the injuries described in the medical report in Mibanga as "*extraordinary in their severity*" (at 21) and it was in that context that Wilson J stated that the adjudicator had fallen into legal error by addressing the medical evidence only after she had conclusively rejected central features in the appellant's case as incredible (S:22). In S the court held that the logic of Mibanga did not apply because the structure of the immigration judge's reasoning here did not fall foul of that artificial separation and structural failure which were found to exist in Mibanga, and because the medical evidence in

Mibanga was so powerful and so extraordinary as to take that case into an exceptional area (at 24). Neither of those scenarios applies in the present case either. As in S, the judge sets out all the evidence considered (at 7, 9, 23, 24, 25, 26, 32, 35, 49, 50, 52 and 52). She specifically refers to the medical evidence and the appellant's health. She sets out the appellant's claim at length. She also refers repeatedly to the evidence and the claim in her findings. As in S (at 25), these factors demonstrate that the judge had taken proper account of all the evidence, including the medical evidence, at the appropriate stage.

30. Reference was also made to JL (medical reports – credibility) (China) [2013] UKUT 00145 (IAC) and I have considered that. The second head-note states, *inter alia*, that: "*when an advocate wishes to rely on their medical report to support the credibility of an appellant's account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent on what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23])*".

31. In this case, the authors of the letters relied on by the appellant based their assessment and opinion on what they were told by the appellant. That reduced the weight the letters could be given and the judge did not err in so finding. None appear to have considered the appellant's ability to return to India with her partner when they make comments as to the impact upon her of removal on her own.

32. Mr Jesuram also complained that the judge had been wrong to raise an issue that the respondent had not relied upon in the decision letter; namely, the circumstances in which her first child was born. It is correct that the decision letter does not touch on this topic but then there is no consideration at all of the claimed events in India and equally no acceptance or rejection of them. The application was refused on suitability grounds because the respondent considered that the appellant had used a fraudulently obtained TOEIC certificate from ETS in support of earlier applications. The respondent also considered that the appellant would be able to access medical care in India and that there were no very significant obstacles to her re-integration there.

33. The judge had evidence before her of the appellant's claim that she had been unconscious during the birth of her first child, that the birth had taken place in secret in accommodation organised by her partner and that she had been told when she regained consciousness that the baby was stillborn/had died at birth. There is no mis-recording or misunderstanding of the appellant's evidence as was submitted by Mr Jesuram. That is what she stated in her witness statement and her

solicitors' representatives make the same contention. Both the appellant's witness statement were adopted as true and correct at the hearing, according to the Record of Proceedings. The judge did not accept the account of the birth for the reasons she gave at paragraphs 36-38 however this did not go directly to the reasons for the appeal's failure. The appeal was dismissed because the judge found that there were no very insignificant obstacles to the appellant's return to India, that she could return with her Indian partner and her young son, because the suitability requirements had not been met and because there was no article 8 breach (at 54, 55, 57, 58, 59, 62). The judge's approach to the issue of delivery of the child in India, even if Mr Jesuram is right that the matter should have been put to the appellant, is not material to the outcome of the appeal and does not make the decision unsustainable because there are so many other difficulties with the appellant's case.

34. It should, however, be noted that the story over the secret birth in a flat arranged by the appellant's partner (as set out in the witness statements - both of which were adopted at the hearing - and in the representations which accompanied her application) conflicts entirely with what the appellant told her therapist at Hounslow IAPT. The account set out by Rashmeet Gupta on 8 June 2016, states that she was told by the appellant that she had delivered the baby in a hospital in India, that it was a difficult birth and that the doctors took the baby away for treatment as it was unwell. She was then informed the following day that the baby had died. There is no reference to a secret birth in a flat or to being unconscious for the delivery. There is a claim that her partner was violent and abusive towards her which is not mentioned in her witness statement or the representations and there is also a claim that she was not in a relationship with him (at F1-2). In her evidence to the judge, however, it is claimed that the relationship is ongoing. The letters raise many other discrepancies over the timing of her partners abuse and its cause, of the number of times she claimed to have been raped and her claims of being suicidal. However, these were not explored by the judge and it is not necessary to go through them at this stage. Suffice to say that they all further undermine the appellant's credibility.

35. A further point of criticism is that the judge did not consider the best interests of the appellant's son. I have examined the evidence before the judge and the submissions made, as recorded by the judge in her Record of Proceedings. No submission was made on s.55 and there was no evidence which even touched upon the issue or suggested that the best interests of this very young child could be anything other than remaining with his mother wherever that might be. It would have been preferable had the judge addressed this issue, even if only to say that there was no evidence on it, but given the child's very young age (he is 2 years old) and the absence of any evidence about him, it is difficult to see how any other decision could have been reached. It was now maintained that the

appellant has obtained DNA test results to show that her partner is not the father of the child. This is a matter which neither the respondent nor the judge had knowledge of and is something that it is open to the appellant to put to the respondent by way of fresh representations along with any information as to the status of the child's father.

36. The judge's findings on the issue of deception were also criticised. Mr Jesuram submitted that the judge had already reached an adverse finding on credibility before she considered the ETS matter. As I have explained earlier, that is not what the judge did. She considered all the evidence, reached a conclusion and then set out her reasons. She found that the Look Up Tool identified the test supposed to have been taken by the appellant (at 49), that the voice recognition software identified the use of a proxy, that the results had been invalidated, that 88% of tests taken on that date were declared invalid and a further 12% rated questionable (at 50 and 52) and that incriminating evidence was found when the homes of the college directors were searched (at 52). The judge properly found that if the appellant had genuinely taken the test she would have witnessed the wide-scale use of a proxy on that date who participated with the knowledge of the directors (at 52-3). She took account of the explanations offered by the appellant, noted her language ability but found no credible innocent explanation had been given (at 51). She also found that the respondent had discharged the burden on her (at 54). Those findings were open to her on the available evidence.

37. The judge reached sustainable findings on the appellant's private life (at 55-61) and also found that the decision was a proportionate one (at 62).

38. Mr Jesuram conceded that the ground on the issue of statelessness had not been made out and he quite rightly did not pursue it. The finding made by the judge (at 42) that the appellant had not established that her son was stateless stands.

39. Mr Jesuram also took no issue with the judge's finding that the appellant and her partner were probably not of different faiths but that in the absence of any evidence from him, she was unable to make a finding as to the appellant's claimed faith or alleged change of faith (at 39).

40. The appellant did not pursue any claim based on Christianity.

41. For all the reasons set out above, I conclude that there are no material errors in the judge's determination.

42. Further documentary evidence has been submitted since the hearing on 20 January 2020. This evidence was not placed before the First-tier Tribunal as is acknowledged and cannot form part of my assessment.

Decision

43. The appeal is dismissed.

Anonymity

44. No request for anonymity has been made and no order was made by the First-tier Tribunal but for the protection of the appellant's son, I make an anonymity order.

Signed

Upper Tribunal Judge

Date: 23 January 2020