Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001803**
(HU/20483/2019)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 5th September 2022	**On the 17 October 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

YETUNDE JANET DADA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Youssefian instructed directly via Advocate (formerly the Bar Pro Bono Unit)
For the Respondent: Ms Ahmad, a Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

© CROWN COPYRIGHT 2022

1. The appellant is a Nigerian national born on 4 November 1975. She appeals the decision of FTT Judge Bart Stewart (the FTT Judge) who, having dealt with arguments at length, dismissed the appeal on human rights grounds because she did not accept the appellant's account that she had been the victim of forced marriage and domestic abuse and did not consider that her removal would be in breach of the ECHR.

2. The appellant had first entered the UK as a visitor and received a number of extensions to her leave. On 8 January 2018 she had applied for leave to remain outside the Immigration Rules. On 24th April 2019 the respondent refused that application with no in-country right of appeal. However, subsequently the respondent reinstated the right of appeal. She considered the application under sub-paragraph 276 ADE (1) but concluded that there were no "very significant obstacles" to the appellant returning to Nigeria. She did not accept that there were circumstances disclosed by the appellant which warranted granting leave to remain outside the Immigration Rules with reference to Article 8 ECHR.

3. The appellant appealed that decision under Section 82 of the Nationality, Immigration and Asylum Act 2002 on the basis that the Secretary of State's decision to refuse her human rights claim was contrary to the United Kingdom's obligations in particular under Article 8 of European Convention on Human Rights (ECHR).

The appeal to the Upper Tribunal

4. The grounds criticise the FTT Judge for her decision, which was promulgated on 19 October 2021. They state that the FTT Judge attached insufficient weight to the expert report prepared by Hadil Aloloum, a psychotherapist. She identified that the appellant suffered PTSD, having allegedly suffered trauma due to a forced marriage and domestic abuse by her ex-husband in Nigeria. But the FTT Judge stated that the expert's report lacked credibility and therefore rejected the report. She was especially criticised for criticising the report for being unsigned when in fact a version had been provided in signed form.

5. The application for permission to appeal against the decision of the FTT Judge was considered by FTT Judge I Boyes. He noted the grounds asserted that the FTT erred in numerous respects with regards to the expert witness and the assessment of the case as a whole. On 1 December 2021 permission was granted on all grounds, as these were found to be arguable.

The hearing

6. At the hearing it became clear that the Tribunal did not have the same version of the expert's report of Mr Aloloum, which was at the heart of

the appeal, as the advocates had. The index to the appellant's section of the consolidated bundle provided to the Tribunal referred to a draft report but Ms Ahmed, although initially of the view the report had been unsigned, pointed out that in fact a draft version of the report had been submitted with the bundle on 14 September 2021. Subsequently, a final, signed version was attached to an e mail to the FTT on 15 or 18 September 2021. The appellant or her advisers may have been responsible for the mistake but not the failure to place the updated bundle before the FTT Judge.

7. Ms Ahmed therefore accepted that the judge had fallen into error in concluding that Ms Aloloum's report was unsigned. She also accepted that there was in fact no significant inconsistency between the account given by the appellant and that contained within the expert's report. It was difficult to see how the FTT Judge had reached the conclusion that she should attach "less weight" to the expert report. She nevertheless sought to submit that the judge's error was immaterial to the outcome; given the cogent points taken against the appellant's account by the judge, she submitted that proper consideration of the report would not have altered the outcome.

8. Mr Youssefian submitted that there were a number of deficiencies in the FTT's approach. He relied on the case of the **E and Rv Secretary of State** [**2004] EWCA Civ 49**. At [66], Carnwath LJ (delivering the judgment of the Court) concluded that the time had come to accept that a mistake of fact giving rise to unfairness was a separate head of challenge in an appeal on a point of law. The ordinary requirements for such a finding were:

> First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

9. It was suggested that there was in fact a "**Mibanga** error" (from the case of **Francois Mibanga v Secretary of State for the Home Department** **[2005] EWCA Civ 367**), if, as appeared to be the case, the FTT Judge had made her findings of fact without considering the expert evidence. However, in relation to the other grounds of appeal, Mr Youssefian, simply relied on his written grounds.

10. Miss Ahmad referred to paragraph 51 to 52 of the decision. She accepted there appeared to be an error in that the judge appeared not to have been referred to the final version of the report. However, the

judge had recorded what she considered to be inconsistencies. It was accepted that aspects of her conclusions on the expert evidence of Mr Aloloum in her decision were "problematic". In fact, the inconsistences between the appellant's account and Mr Aloloum's report were not significant, she accepted. Miss Ahmad queried whether the factual differences that the judge found were there. However, Miss Ahmad did not accept the error made by the FTT was material. We were referred to paragraph 50 of the FTT decision, where the judge refers to the appellant marrying against her will. It appears this related to evidence given at paragraphs 11 and 12 in relation to her brother. Paragraph 12 was in fact the only inconsistency there appeared to be.

11. Judge Blundell asked whether the appellant may have been vulnerable witness to whom the Joint Presidential Guidance Note No 2 of 2010 applied. If that was so, he asked Ms Ahmed whether the judge might have erred in failing to evaluate the appellant's credibility with any such vulnerability in mind, as required by [15] of that Guidance Note (as to which, see **AM (Afghanistan) v SSHD (Lord Chancellor Intervening) [2017] EWCA Civ 1123; [2017] Imm AR 6**).

12. Ms Ahmad did not accept that there had been any failure to follow the Presidential Guidance because it had not been drawn to the Tribunal's attention. There was no representation that the appellant ought to be treated as a vulnerable witness and indeed little had been said about the diagnosis of the PTSD by her advisers which tended to put the FTT on-notice of this.

13. Judge Blundell also queried whether the judge could be said to have taken proper account of the expert's report when considering whether the appellant would experience very significant obstacles to her re-integration to Nigeria.

14. It was also pointed out by the Tribunal that the appellant had not made an asylum claim or claim for humanitarian protection. Miss Ahmad pointed out that in the absence of an application she had not come prepared for dealing with any points about the alleged vulnerability of the appellant.

15. In reply, Mr Youssefian accepted that the Joint Presidential Guidance at paragraph 5 suggests the primary responsibility was with the representatives to draw the tribunal's attention to any vulnerability on the part of the witness. He submitted that it was nevertheless incumbent on the Tribunal, when faced with such a report, to consider for itself whether and if so to what extent to treat an appellant as a vulnerable witness.

Conclusions

16. Through no fault of the FTT Judge's, she proceeded on the basis that the medical evidence of Mr Alaloum was a draft unsigned report rather than the final version. The Tribunal notes that the index to its bundle also refers to the report as a "draft". This is unfortunate as was the fact that the bundle in final form appears to have been submitted late. It is nevertheless clear, and was accepted by Ms Ahmed, that the final, signed version of the report was filed and served as an attachment to an email sent shortly before the FTT hearing. It appears that this final version was not provided to the judge before or after the hearing but that is a failing on the part of the FTT's administration.

17. In as far as the appellant is advancing a claim to humanitarian protection or asylum, she has not made a formal application. It is incumbent upon asylum claimants to advance their claims to allow proper investigation and a failure to claim asylum might legitimately entitle a decision maker to draw an adverse inference as to the credibility of such a claim: **JA (Nigeria) [2021] UKUT 97 (IAC); [2021] Imm AR 952**. Mr Youssefian referred to the case of **QC (Verification of documents: Mibanga duty) China [2021] UKUT 33 (IEC)** in which the Upper Tribunal emphasised that not every case requires that the Tribunal to consider credibility. Each case will need to be examined with care to consider whether that is necessary and the "Mibanga-duty" only arises where credibility is an issue. This requires the credibility be to be considered "in the round" (see **François Mibanga v the Secretary of State for the Home Department [2005] EWCA Civil 367**).

18. At the end of the hearing before the Upper Tribunal it was decided to remit the matter of the First-tier Tribunal for a *de novo* hearing before an FTT judge other than Judge Bart-Stewart. The Tribunal considered that the FTT Judge had fallen into error through no fault of her own. The evidence from Mr Aloloum was potentially relevant to the evaluation of the appellant's credibility and therefore to her human rights claim, although it is noted that there is no asylum or humanitarian protection claim. In addition the FTT Judge appeared to have concluded that the expert evidence was inconsistent with the appellant's evidence and incredible when this appears not to be the case. The FTT was not bound to accept the psychotherapist's opinion about the appellant's mental health. Nor was it required to accept that the trauma detailed in that report was caused in the manner suggested by the appellant. What was required was engagement with that report and the provision of good reasons for reaching a contrary conclusion: **SS (Sri Lanka) v SSHD [2021] EWCA Civ 155, at [21]**. The reasons given by the judge are demonstrably insufficient to pass the second of those tests for the reasons we have given.

19. The Tribunal considered the error of law to be material because Mr Aloloum's evidence as to the appellant's mental health was necessarily relevant to the evaluation of the appellant's credibility, as stated in [15] of the Joint Presidential Guidance. We accept Mr Youssefian's submission that it is not inevitable that lawful consideration of that report would have made no difference to the outcome of the appeal. Whilst the judge clearly had significant and wide-ranging concerns about the appellant's credibility, she might have reached a different conclusion if she had not erred in her treatment of the expert evidence. It was therefore concluded that the decision of the FTT could not stand and that it was necessary to set-aside the entire decision and remit the matter to that FTT.

20. The case highlights that there is greater scope for confusion as to what documents have been supplied without customary discussions outside court which take place at attended hearings. Hence it was considered appropriate to suggest that the re-hearing be attended but it is ultimately of the FTT to make appropriate directions.

Notice of Decision

The appeal is allowed. The decision of the FTT is set aside in full. The appeal is remitted to the FTT to be heard by a judge other than Judge Bart-Stewart as an attended hearing.

All further directions are to be made by the FTT

Signed
Date 14 September 2022

Judge Hanbury

Deputy Upper Tribunal Judge