



Case No: C5/2018/2068

**Neutral Citation Number: [2018] EWCA Civ 3042**  
**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(IMMIGRATION AND ASYLUM CHAMBER)**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Monday, 26 November 2018

**Before:**

**LORD JUSTICE HICKINBOTTOM**

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**Between:**

**OA (NIGERIA)**

**Applicant**

**- and -**

**SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

**Respondent**

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(Official Shorthand Writers to the Court)

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**Ms S Akinbolu** (instructed by Wilson Solicitors) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

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**Judgment**  
(Approved)  
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**LORD JUSTICE HICKINBOTTOM:**

1. The Applicant is a Nigerian national. Her version of the relevant events, so far as relevant to this application, is as follows.
2. In 2001, she married KA. In 2004, they had a son. In 2010, both her son and then her husband died. KA's family were traditionalist, and wanted her to perform rituals in respect of her husband's dead body, which she refused to do. She became scared and went to live with her parents. She was visited there by her husband's brother, who threatened her because he thought she had killed her husband; and he thought the family would continue to experience bad things because she had not performed the traditional rituals.
3. In August 2011, whilst she was still living in Nigeria, she married a Hungarian national, PS, by proxy. He was living in the United Kingdom. Four weeks later, whilst she was still in Nigeria, she was kidnapped by her former brother-in-law and held at an unknown place, where she was ill-treated and raped by him. She was rescued by her parents, who were told where she was by her former husband's driver. She left Nigeria for the United Kingdom in November 2011, and was given leave to enter as a visitor until May 2012.
4. She did not apply for asylum. In August 2012, she applied for an EEA residence card as the wife of PS. That application was refused by the Secretary of State on 5 February 2013, and refused on reconsideration on 9 September 2014. In the meantime, the Applicant had realised that she was bisexual, and she started an affair with a married woman in mid-2014.

5. The Applicant appealed against the refusal of her EEA residence card application, but the First-tier Tribunal (Immigration and Asylum Chamber) (“FtT”) refused the appeal on 10 March 2015 on the basis that her marriage to PS was a sham. She said that her relationship with PS ended in 2015, as did her relationship with the married woman.
6. On 9 June 2016, the Applicant was arrested on suspicion of fraud. The following day, 10 June, she was detained in an immigration detention centre; and, on 15 June, she was served with directions for removal to Nigeria on 6 July 2016.
7. However, in the meantime on 22 June 2016, she applied for asylum on the grounds that on return to Nigeria she would face the risk of persecution, particularly from her late husband's family and more generally on account of her sexual orientation. Her removal directions were cancelled. Her asylum application was refused on 5 May 2017. She appealed to the FtT.
8. The appeal was heard by First-tier Tribunal Judge Hussain on 4 October 2017, and he dismissed the appeal by way of a determination promulgated on 27 November 2017. At the hearing, amongst other evidence, the Applicant relied upon a report from Dr Cornelius Katona, a consultant psychiatrist who works as medical director for the Helen Bamber Foundation, a charity which supports refugees and asylum seekers who have experienced torture and human trafficking. Dr Katona's opinion was the Applicant suffered from PTSD and depression, his diagnosis for PTSD being based on a number of factors including that she had described experiencing a relevant stressor, namely being kidnapped, ill-treated and raped by her former brother-in-law as well as suffering relevant signs and symptoms.

9. Judge Hussain accepted that the Applicant had PTSD; but, given the inconsistencies in her account – which he set out in detail – and her failure to raise the asylum claim or any points made in it until after her EEA residence card application had been refused and her removal directions fixed, he did not find her account to be credible. At paragraph 34 of his determination, he said in terms that the Applicant's claim "must be assessed in the light of the totality of the evidence before the tribunal". However, he referred to Dr Katona's evidence only twice, and then quite briefly. At paragraph 19, the judge literally referred to the report, but not to its content; and, after a lengthy passage setting out the internal inconsistencies etc in the Applicant's own account, at paragraphs 52-53 (under the heading "My findings", which focused on the Applicant's credibility (see paragraph 30), the judge then went on to say:

“52. The appellant has enlisted the assistance of a psychiatrist expert, whose report concludes that the appellant suffers from PTSD. I have no reason to doubt that the appellant does suffer from that condition, which is supported by other medical evidence in the bundle. However, what is unexplained is if this condition developed, as is claimed by the expert, due to the appellant's experiences in Nigeria (referred to above) then why it is that she only sought assistance after she claimed asylum in June 2016. If the severity of her condition is as it is described, then she would have needed medical intervention earlier. Yet, she appears to have chosen only to turn to medical attention after she claimed asylum.

53. Whilst I have taken into account the medical opinion and have sought to give weigh to the findings, the conclusion to which I have come is, in light of the totality of the evidence, that I reject that she developed this condition as a result of the experience as described by her in Nigeria.”

10. An appeal to the Upper Tribunal (Immigration and Asylum Chamber) was refused by Deputy Upper Tribunal Judge Froom in a determination promulgated on 30 April 2018. On ground of appeal was that Judge Hussain had failed properly to consider the expert evidence of Dr Katona, and notably had failed to give reasons for rejecting the cause of

the PTSD he had put forward which was relevant to the credibility finding. The Secretary of State accepted that Judge Hussain had not dealt with the causation of the PTSD fully; but submitted that, nevertheless, the medical evidence provided could not possibly have led to there being a breach of article 3 of the European Convention on Human Rights as was alleged on behalf of the Applicant (see paragraph 18 of the determination). The Deputy Judge too accepted the diagnosis of PTSD. He accepted the experience and expertise of Dr Katona, and also that Dr Katona had considered alternative causes of the PTSD to dismiss them. In considering the determination of Judge Hussain, he said:

9. The judge noted that a medico-legal report had been provided, prepared by Professor Cornelius Katona MD FRCPsych, a consultant psychiatrist, concluding that the appellant suffers from PTSD. The Judge accepted he had no reason to doubt that the appellant does suffer from that condition. However, the Judge declined to give this matter significant weight as corroboration of the claim because he considered it had not been explained why, if this condition had developed due to the appellant's experiences in Nigeria, she only sought assistance after she claimed asylum. He noted, 'if the severity of her condition is as it is described, then she would have needed medical intervention earlier. Yet, she appears to have chosen only to turn to medical attention after she claimed asylum.'

25. That leaves the question of the medical evidence. The judge looked at this within his consideration of the other limb of the appellant's claim, regarding her fear of her ex-husband's family. That is no doubt because the report of Professor Katona was important evidence when it came to assessing the credibility of the appellant's account of having been ill-treated and raped. Professor Katona is a well-respected expert who frequently provides medico-legal reports to the tribunal. He is eminently well qualified and his reports contain clear reasoning and follow a well-established methodology.

28. So far so good. However, I note at this point that Professor Katona does not appear to have been told that the appellant's marriage to Mr Straub was a sham, as determined by the Tribunal in March 2015. In fact, Professor Katona sets out a great deal about the appellant's marriage in his recitation of her account and goes on to use her decision to stay with her second husband despite his abusive behaviour as evidence of her vulnerability (see

paragraph 8.4). Therefore, where Professor Katona sets out his reasons for his opinion that the appellant was not feigning or exaggerating her symptoms (see paragraph 6.1), he did not take account of the fact the appellant had pursued dishonest applications to the Home Office, which she maintained at an appeal hearing.

29. At the hearing I indicated that I was attracted by Ms Akinbolu's submissions about the judge's approach to the medical evidence (ground 3). However, the fact Professor Katona was not aware that the appellant has a history of deceptive conduct must be a matter significantly reducing the weight which can be given to his report as potential corroboration. His clinical finding that the appellant suffers from PTSD is probably sound but his observations about causation must be open to question.

30. Although this was not a point taken by Judge Hussain in his decision, it must blunt the force of Ms Akinbolu's challenge to his use of the report. To the extent Ms Akinbolu argued the judge was obliged to give the report greater weight towards establishing the appellant's account, the strength of her arguments is diminished.

11. The Deputy Judge therefore refused the appeal on all grounds, including this one.
12. The Applicant appealed to this court on a number of grounds. On 2 October 2018. I refused all grounds except one – namely that the way in which the Deputy Judge dealt with the issue of expert evidence was wrong in law – which I adjourned into open court. It is the application for permission to appeal in respect of that ground which is now before me.
13. How tribunals should treat expert evidence when considering the credibility of an applicant for asylum has been the subject of a number of relatively recent decisions, including decisions of this court, for example R (AM) v Secretary of State for the Home Department [2012] EWCA Civ 521 and KB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 1190. These cases show that in considering issues of credibility a tribunal may be required to take a holistic approach to the

evidence, including expert evidence. Of course the tribunal does not have to accept the expert evidence. An applicant's account may contain elements that the fact-finder (including the FtT) can properly find is not credible, even where there is expert evidence to the contrary; or he may find that the applicant did not accurately portray his signs and symptoms to the reporting expert. But the fact-finder has to take into account the expert evidence which might be relevant to the issue of credibility.

14. In this case, Ms Akinbolu for the Applicant submits that the FtT simply failed properly to do so. It is arguable, she submits, that that was an error of law which was not corrected by the Upper Tribunal, the Deputy Judge appearing to accept that Judge Hussain erred in respect of his analysis of the expert evidence; but, although Judge Hussain's analysis may have been deficient, Dr Katona's opinion on causation was fundamentally flawed because he had not been told that the Applicant had lied about the genuineness of her marriage to PS. However, as a matter of fact, Dr Katona was aware that the Applicant's second marriage had been held by the tribunal to be a sham.
  
15. The hurdle at this stage is a low one. I am persuaded that the Applicant should be granted permission to appeal. In coming that conclusion, I accept that the internal inconsistencies etc of the Applicant's own account, as set out quite fully by Judge Hussain, made the issue of credibility a potentially challenging one for her. However, in my view it is at least arguable that Judge Hussain never properly considered the expert evidence in relation to credibility; and also that that is not only arguable but it raises an important issue of principle or practice, namely the correct approach to expert evidence in cases such as this so that the second appeal criteria are satisfied. Insofar as Judge Hussain did err in law – and it seems to have been common ground before the

Upper Tribunal that his analysis of the expert evidence was deficient – that error was at least arguably not properly addressed by the Deputy Judge in the Upper Tribunal, who appears to have proceeded on a false factual basis.

16. For those reasons, I will grant permission to appeal on this ground.

**Order:** Application granted