



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00047/2016

THE IMMIGRATION ACTS

Heard at: Manchester
On: 31st January 2018

Decision & Reasons Promulgated
On: 6th February 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DLS
(ANONYMITY DIRECTION MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Wilkins, Counsel instructed by Broudie Jackson Canter
Solicitors

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Nigeria born in 1974. She appeals with permission the decision of the First-tier Tribunal (Judge Gurung-Thapa) to dismiss her protection appeal¹.

¹ Permission granted on the 23rd October 2017 by First-tier Tribunal Judge MJ Gillespie

Background and Matters in Issue

2. The substance of the Appellant's claim for asylum is that she has been, over a prolonged period, subjected to sustained serious harm as a victim of trafficking for the purposes of sexual exploitation. The core facts are that she was born into poverty in rural Nigeria, and that when she was in her late teens some visitors offered her work abroad as a housemaid or nanny. She agreed and her departure from Nigeria was organised. She was taken to Italy where she was forced into prostitution in a brothel containing 22 other girls. She was held there for approximately seven years before being able to escape with the assistance of a punter. She was brought to the UK and ended up seeking assistance from a church and its congregation; the Appellant states that in the years immediately prior to claiming asylum in 2014 she had been living with a family in London where she was paid in kind for helping with the children and doing housework.
3. The Respondent had rejected the Appellant's claim for want of credibility, identifying a number of discrepancies in her account. The case had been referred to the Competent Authority and they had reached the same conclusion. The Appellant appealed to the First-tier Tribunal.
4. When the matter came before the First-tier Tribunal she was represented by experienced Counsel. The case put to the First-tier Tribunal, it is uncontroversial, is that the Appellant has been unable to give a coherent account because she has been mentally affected by her long exposure to "violent and depraved" sexual abuse and exploitation. She had been diagnosed with severe Post Traumatic Stress Syndrome with associated psychotic features and she relied upon two reports to this effect by Consultant Psychiatrist Dr Chandra Ghosh. Dr Ghosh explained that she had made the diagnosis having assessed the Appellant's symptoms, (as related by her), having taken account of "signs" (i.e. his own observations of her behaviour) and having checked for corroborative material (in the form of her medical notes including evidence from her GP and therapists).
5. The First-tier Tribunal dismissed the appeal. It found there to be numerous significant discrepancies in the Appellant's evidence, particularly in respect of what happened to her in Nigeria before she left for Italy, and in what happened to her in the UK after she had escaped. Although the determination does not state in terms what weight it attaches to the report of Dr Ghosh, it implicitly rejects its relevance, finding that Counsel had failed to identify how the conclusions in the reports were based on anything other than what Dr Ghosh had been told by the Appellant. Since the Appellant's credibility had been rejected by the Tribunal, it followed that the conclusions of Dr Ghosh, based as they were on an acceptance that the account was true, were of negligible value. As for the Appellant herself, the Tribunal was evidently unimpressed by her decision not to give live evidence at the hearing. The determination notes [at §43] that "no reasons were put forward as to why she would not be giving oral evidence", [at §49] that the HOPO was "denied the opportunity to cross examine the Appellant" and [at §51, §52] and that the Appellant failed to rebut or give explanations for the deficiencies in her case identified in the Respondent's

refusal letter. The Tribunal concluded that the Appellant's account was a fabrication, that there was no risk of harm and that she could return to her family in Nigeria.

6. The Appellant has been granted permission to appeal against that decision on the following grounds:

i) Failure to take submissions into account.

The grounds express surprise at the terms of paragraph 49 of the determination where it reads that "no explanation" was given as to why the Appellant was not giving evidence. Counsel for the Appellant Ms Wilkins believes that she had given a reason, namely that her instructions were that when the Appellant's solicitor had tried to take a witness statement the Appellant had become so distressed that it was impossible to do so. It is further submitted that if the Tribunal had concerns, or felt there to be a lack of information, it was procedurally improper for that matter only to be raised in the determination.

ii) Procedural Unfairness.

The Tribunal declined to place any weight on the conclusions of Dr Ghosh having applied the guidance in HE (DRC - credibility and psychiatric report) DRC [2004] UKIAT 00321 to the effect that where psychiatric evidence is relied upon to support credibility submissions, counsel "must identify what about it affords support to what the claimant has said and which is not dependent on what the claimant has said".

It is submitted that this approach was procedurally unfair where Counsel specifically asked the Tribunal if there was anything further that she could assist with, and where it was obvious from the face of the report itself what conclusions Dr Ghosh had derived from her own observations and those of clinical colleagues.

iii) Failure to make findings.

Dr Ghosh had prepared two detailed psychiatric reports but the determination contains no clear conclusions as to a) whether it accepts that the Appellant is in fact suffering from Post Traumatic Stress Syndrome with associated psychotic features or b) if she is how that might have come about.

Counsel had made detailed submissions on the likelihood of appropriate psychiatric treatment being available to this Appellant in Nigeria, and had placed reliance on Paposhvilli v Belgium. Even if the Appellant's account was rejected, it remained incumbent on the Tribunal to assess the psychiatric evidence in the context of Articles 3 and 8 ECHR.

Discussion and Findings

7. I need not set out the submissions made before me in any great detail since the parties were in agreement that grounds (i) and (ii) were made out, and that they established material error of law.
8. As to the decision not to call the Appellant that was of course a matter for her, and her legal team. There is no obligation upon appellants to give oral evidence. Where however the Respondent has raised issues that require clarification, or questions that need to be answered, a party who declines to testify cannot complain if the Respondent's case is preferred over her own. Ms Wilkins accepts those basic propositions.
9. What she has objected to here is that in drawing the negative inference that it has, the Tribunal has apparently overlooked the explanations offered as to why the Appellant would not be called. Although Dr Ghosh had found the Appellant fit to give evidence in the sense that she had capacity to do so, it was the position of the Appellant's solicitor that she had been unable to take sensible instructions from the Appellant because the Appellant simply became too distressed to speak when asked to think about material parts of her account. She had briefed Ms Wilkins to that effect. Although Ms Wilkins candidly acknowledged that she could not recall exactly what she might have said to the Tribunal, she was able to produce her speaking note (in the form of notes to her own skeleton argument) which expressly raises the solicitor's concerns. For his part Mr Diwnycz accepted that it would be most unlikely that counsel would not have explained the reason why her lay client was not being called. He acknowledged that Broudie Jackson Canter had on the 10th April 2017 (some three months prior to the hearing) written to the First-tier Tribunal to advise it that the Appellant would not be giving evidence, and why. I note from the court file that this had also been an issue raised at the CMR in September 2016, and in another letter from Broudie Jackson Canter dated the 7th April 2017 the Tribunal was advised that they had been unable to take instructions due to the Appellant's "deteriorating mental health condition".
10. The second ground relates to the approach taken to the evidence of Dr Ghosh. The concern quite properly raised by the First-tier Tribunal is that where clinicians make a diagnosis simply on the basis of that they have been told, such a diagnosis will be, absent other factors, of very limited value to a Tribunal charged with making an overall evaluation of credibility. As a matter of logic more weight will be attached to such a diagnosis if it based on the doctor's own clinical observations or those of other medical professionals. Again, Ms Wilkins accepted those propositions to be uncontroversial.
11. She submitted that in this particular case, however, it was clear from the two reports of Dr Ghosh, and indeed the NHS notes that had accompanied them, that Dr Ghosh had not confined her analysis to what she had been told by the Appellant. Dr Ghosh had expressly set out her methodology at the beginning of the report and had stated in terms that she based her diagnosis not only on (self-reported) symptoms, but on (clinically observable) "signs" and the Appellant's medical history. She had then throughout her report referred to such "signs" and corroboration from the

Appellant's interaction with mental health services. For instance, Dr Ghosh records at page 3 of her first report how the Appellant "became very distressed" when relating her trafficking experience, and [at page 4] how questions that upset her resulted in her "hyperventilating" and becoming "virtually mute". In her second report Dr Ghosh again states that she observed the Appellant becoming extremely distressed and how this has also been "stated elsewhere": I understood this to be a reference to the appended notes of the Appellant's assessment by Mersey Care NHS Foundation Trust wherein the notes of several practitioners have been collated. Relevant observations taken into account by Dr Ghosh included the evidence of Jackie Jones, a Band 6 Mental Health Practitioner, who states that on one occasion the Appellant "immediately tensed up visibly" when a male interpreter entered the room, and that when he sat down she initially pushed her chair back into the corner. Ms Jones also records that the Appellant has appeared "objectively distressed/agitated" and "unsettled" on various occasions when they have met.

12. The First-tier Tribunal found that the weight to be attached to Dr Ghosh's reports was diminished because she had based her diagnosis exclusively on what she had been told, and/or because Ms Wilkins had failed to demonstrate otherwise. As I think the paragraph above illustrates, the Tribunal erred as a matter of fact if it concluded that this had been the methodology adopted by Dr Ghosh. Mr Diwnycz accepted that in applying so literal an interpretation of HE (DRC - credibility and psychiatric reports) DRC [2004] UKIAT 00321 the Tribunal - no doubt inadvertently - did act unfairly. The point made in that case is that reports based *entirely* on self-reporting are of very little value as far as credibility assessments are concerned and for that reason representatives should be expected to be able to identify, when asked, what part of the report the Tribunal can safely place significant weight upon. In this case Counsel did not do so (or at least did not do so to the Tribunal's satisfaction) because she regarded it as evident from the face of the report.
13. Given the position of the Secretary of State for the Home Department on grounds (i) and (ii) I need not address ground (iii) which is concerned with the application of Paposhvili. As it happens on the morning of the hearing the decision of the Court of Appeal in AM (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 64 became available. The setting aside of the decision of the First-tier Tribunal and the remittal of this matter will give the parties an opportunity to consider the effect of that judgement on how the Appellant's representatives choose to now put her case.

Decisions

- 14 The making of the First-tier Tribunal decision involved an error in approach such that the decision is set aside.
- 15 The matter will be remade following a *de novo* hearing in the First-tier Tribunal.

Upper Tribunal Judge Bruce

2nd February 2018