Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01216/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre **Remotely by Microsoft Teams** **On 22 July 2021**	**Decision & Reasons Promulgated** **On 19 August 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

VD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Sanders instructed by Oliver & Hasani Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Albania who was born on 6 September 1987.

3. The appellant arrived in the United Kingdom on 21 August 2013. On 21 February 2014, she claimed asylum. She claimed that in November 2012 she had been attacked when returning from work. She had been forced into a car by a stranger and raped before being left unconscious on the roadside. In June 2013, she was confronted by the same man who again attacked her and forced her into a car driven by another man where she was taken to a house and repeatedly raped by the two men. She claimed that she had been held for two weeks and forced to have sex with several men before being taken to Verona in Italy. She claims that she managed to escape from her captors in the airport and went to live with her husband who, coincidentally, was living nearby. She then discovered that she was pregnant and that the child was not her husband's. As a result, her husband decided he no longer wanted to be with the appellant and he organised her travel to the UK clandestinely where she arrived on 12 August 2013. In the UK, the appellant claimed that in 2016 she had attended a party where she had had more than the usual amount to drink and suffered memory loss. Afterwards, she realised she was pregnant and her son was born on 22 March 2017.

4. The appellant claimed that because of her circumstances, including that she had children born out of wedlock, she would be at risk on return to Albania from her family and from those who had trafficked her.

5. On 31 July 2014, the Secretary of State refused her claim for asylum. The appellant appealed but her appeal was dismissed by the First-tier Tribunal (Judge Malik) on 1 December 2014 and permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 2 January 2015 and by the Upper Tribunal on 25 April 2015. She became appeal rights exhausted on 28 April 2015.

6. On 29 September 2017, the appellant lodged further submissions.

7. Further, on 26 February 2014, a referral was made to the National Referral Mechanism (NRM) in order for the Competent Authority to make a decision as to whether she was a victim of modern slavery. On 3 March 2014, the NRM decided that her trafficking/modern slavery claim was not established.

8. On 24 January 2020, the Secretary of State again refused her claims for asylum, humanitarian protection and under the ECHR.

The Appeal to the First-tier Tribunal

9. The appellant again appealed to the First-tier Tribunal. The appeal was heard by Judge Bonavero on 11 February 2021. At that hearing, faced with the previous adverse decision of Judge Malik, the appellant sought to persuade the judge to accept her asylum claim relying, in particular upon

an expert psychiatric report by Professor Cornelius Katona, an expert report on trafficking by Ian Sweet and a country expert report by Dr Enkeleda Tahiraj.

10. In his decision, Judge Malik found the appellant not to be credible and dismissed her asylum claim based upon her feared risk on return.

The Appeal to the Upper Tribunal

11. The appellant sought permission to appeal to the Upper Tribunal on three grounds.

12. First, in not accepting that the appellant's second child had been conceived as she claimed as a result of sex with a stranger at a party in 2016, the judge had failed to take into account supporting evidence in the appellant's bundle contained in the appellant's medical records at pages 286 and 339 where she had described the circumstances of the conception of her second child. (Ground 1)

13. Secondly, the judge erred by taking into account that there was a 'gap' in the bundle of medical records submitted on behalf of the appellant covering the period after 27 September 2016 (page 339 of the appellant's bundle). The judge had inferred that the appellant had deliberately withheld that part of the records which covered the time in 2016 when her second child was born. (Ground 2)

14. In the course of her submissions on this ground, Ms Sanders relied upon a witness statement from the appellant's solicitor which explained that the medical records in the appellant's bundle at the hearing were as received by the appellant's representatives from her doctors. They had received them directly and they had not gone to the appellant. Ms Sanders submitted that it was unfair of the judge to count against the appellant the absence of these documents, in particular to infer that she had deliberately withheld them, in the light of the evidence from the appellant's legal representative as to the bundles' origins.

15. Thirdly, the judge had been wrong to rely upon a number of implausibilities in the appellant's account, relied upon by Judge Malik, which in the light of the expert reports called into question whether there was, in fact, any implausibility. (Ground 3)

16. On 22 April 2021, the First-tier Tribunal (Judge Gumsley) granted the appellant permission to appeal.

17. The appeal was listed for a remote hearing at the Cardiff Civil Justice Centre on 22 July 2021. I was based in court and Ms Sanders, who represented the appellant, and Mr Bates, who represented the Secretary of State, joined the hearing remotely by Microsoft Teams. The appellant also joined the hearing remotely.

The Submissions

18. In support of the appellant's case, Ms Sanders relied upon the grounds which I have summarised above. In addition, in her reply, she also criticised the judge taking into account (at para 37 of his decision) that the appellant's second child had "her husband's surname". Ms Sanders pointed out that the birth certificate of the appellant's second child did indeed have her husband's name but that the appellant, herself, used her husband's name also. The name of her second child was, therefore, also the appellant's name.

19. On behalf of the Secretary of State, Mr Bates relied upon the rule 24 reply and submitted that there was no material error of law in the judge's decision.

20. As regards ground 1, Mr Bates submitted that the judge's finding in relation to the appellant's second child and the circumstances of its conception was ancillary, and not central, to the judge's adverse finding.

21. Mr Bates accepted that ground 2 was, in his words, "the high watermark" of the challenge. He submitted that even if the judge had not found that the appellant had deliberately withheld the records, he would still have been entitled to find that their absence was relevant to assessing the credibility of her claim. Mr Bates pointed out that the appellant's legal representative, at para 9 of his statement, could not say whether the GP had in fact sent all the medical records in relation to the appellant. He pointed out that it was still unknown whether there were other medical records that had not been provided.

22. As regards ground 3, Mr Bates submitted that the judge had been entitled to rely upon Judge Malik's reasoning which the judge set out at length at para 24 of his decision by reference to paras 58–65 of Judge Malik's earlier decision. He submitted that Judge Malik, and therefore Judge Bonavero in this appeal, had identified a number of implausible aspects to the appellant's evidence which he was entitled to take into account. Mr Bates submitted that the judge had in fact considered the three expert reports at paras 27–32 (Professor Katona), at para 33 (Ian Sweet) and at paras 34–35 (Dr Tahiraj's report). Mr Bates submitted that the trafficking evidence went no further than saying her account was "consistent with other victims of trafficking". Dr Tahiraj's report, as the judge noted, supports the veracity of the appellant's claim "to some extent" and the judge gave weight to it but, as the appellant's then Counsel accepted, the evidence did not raise any challenge to Judge Malik's plausibility findings. In respect of Professor Katona's report, Mr Bates acknowledged that it accepted that the appellant had symptoms of PTSD but that did not necessarily mean that her condition had been caused as a result of the circumstances that she claimed led to her coming to the UK.

23. Mr Bates invited me to uphold the judge's decision on the basis that there was no material error of law.

Discussion

24. The judge, applying Devaseelan, correctly took Judge Malik's findings and, indeed, his reasoning, as a 'starting point'.

25. As I have already indicated, the appellant sought to persuade Judge Bonavero that that starting point should be departed from on the basis of the three expert reports upon which she relied. In addition, the appellant gave evidence concerning the conception of her second child in 2016, she claimed, as a result of sex with an individual at a party which she could not remember. Mr Bates invited me to conclude that whatever the judge made of this incident, and her second child's conception, was not central to his ultimate adverse credibility finding against the appellant. The difficulty with that argument is that the judge not only doubted the appellant's credibility but made a positive finding that she had misled the Tribunal by deliberately failing to provide medical records concerning that incident. The judge treated the second conception as being relevant to part of the appellant's claim which was that her relationship with her husband had broken down. On its own, and as part of the judge's overall credibility finding, the view the judge took about the conception of the appellant's second child was, in my judgment, material to his ultimate adverse factual findings.

26. Consequently, I must decide whether grounds 1 and 2 taken individually or cumulatively demonstrate that the judge erred in law and his ultimate finding is unsustainable.

27. In that regard, I accept the substance of Ms Sanders' submissions. The relevant passage in the judge's reasons is at paras 37–39 as follows:

> "37. As for the appellant's circumstances, the key change in her life is that she has, since her appearance in the Tribunal in 2014, had another son. The circumstances of her son's conception are somewhat opaque. As set out above, she contends that she attended a party, where she may have been raped, though she remembers nothing about it. She has not provided any evidence from her friend who took her to the party, or anyone else who might be able to support her case in this regard. The appellant is not under any obligation to corroborate her claim. However, in circumstances in which Judge Malik did not accept that she had separated from her husband as claimed, and where, several years after their alleged separation, she now has another child, again with her husband's surname, I am left with significant doubts as to the appellant's account.
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> 38. The appellant's account of her interactions with her GP around the time are also inherently unlikely. The appellant says in her witness statement at para 163 (page 93 of the appellant's bundle) that her GP 'told her immediately to get an abortion' and that the doctor went on to book a private doctor to organise the abortion in order to cover up for a mistake made by the GP in providing a particular type of medication. This is a very serious allegation of misconduct. I note that no complaint appears to have been made against this GP, despite the fact that the appellant is legally represented. I note in this regard that the appellant's health

> records before me jump from December 2014 to 27 September 2016, when the appellant visits the GP in relation to her pregnancy, with the intervening period omitted. In other words, I do not have before me the records covering the period of time during which the appellant claims that she was instructed by her GP to have an abortion and referred against her will to a private clinic for this to take place. I conclude that the appellant has excluded her medical records from that period because those records would have shown that this extraordinary series of events did not in fact occur.
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> 39. In short, the appellant has not satisfied me to the lower standard of proof that the circumstances of her second son's conception and birth were as she claims. So, far from supporting her claim, I conclude that the appellant's account in this regard further undermines it".

28. It was, of course, open to the judge to take into account the absence of supporting documentation that could reasonably be expected to be provided by the appellant (see TK (Burundi) v SSHD [2009] EWCA Civ 40 at [20]-[21]). Indeed, the appellant had not provided any supporting evidence from her friend who had taken her to the party. However, as Ms Sanders submitted, there was evidence in the bundle which supported the appellant's account. That was contained within the medical records that were present in the bundle. At page 286, an assessment by the Stockport Common Assessment Framework for Children and Families undertaken on 18 October 2016 states that:

> "During a meeting to discuss [her son's] graduated response plan to support him within Nursery [the appellant] disclosed that she had become pregnant as a result of unprotected unconsensual sex and did not feel able to cope with her situation".

29. Then at page 339 in an entry in her GP records for 30 September 2016 it is stated that:

> "Possibly had sex 3 months ago – very drunk withfrineds (sic) – chat if not able to give consent rap (sic) – pt agree but declines to go to the police".

30. This is, on the face of it, an unsolicited disclosure on two occasions by the appellant in a social work and GP context relatively contemporaneously to the events which she now relies on in 2016. Of course, the evidence came from the appellant herself and to that extent there was no evidence from anybody else (wholly independently of the appellant) to support her case. However, in para 37 the judge appears not to appreciate that there was this relatively contemporaneous evidence of, in effect, a recent complaint made to her GP and in the social work context that her second son had, in fact, been born as a result of potentially unconsented to sex at a party.

31. In para 37 also, the judge took into account that despite claiming that she has been separated for several years from her husband, her second son has "her husband's surname". As Ms Sanders pointed out, the birth certificate of the appellant's second son gives him a surname which is also

the surname of the appellant who has retained the name of her, as she claims, separated husband. In para 37, the judge did not grapple with this possibility but rather springs to the conclusion that the appellant continues to use her husband's surname for her son which, together with the absence of any supporting evidence, left the judge with "significant doubts as to the appellant's account". That, in my judgment, discloses an error of law.

32. The second ground relates to the judge's reasoning in para 38 in which he relied upon a gap in the appellant's medical records between December 2014 and 27 September 2016 (at pages 339 and pages 343) which would cover the time when the appellant says she went to her GP in relation to her pregnancy and, due to a mistake by the GP, was told to get an abortion.

33. There is undoubtedly a gap in the health records. That gap was not, as I understand both representatives' submissions, raised at the hearing as being an issue. The appellant was, therefore, not given an opportunity to deal with the omission in the appellant's bundle. Without having been given an opportunity to explain, the judge inferred that the appellant has deliberately withheld those documents because, had she not done so, it would have "shown that this extraordinary series of events did not in fact occur". The judge, in other words, infers dishonesty by the appellant in the presentation of her case.

34. In a witness statement dated 16 March 2020, Naim Hasani of Oliver & Hasani Solicitors, who is a solicitor and had supervision of the caseworker responsible for the appellant's appeal, indicates that the medical records received from the GP were sent directly to the appellant's legal representatives who prepared the bundle. It is stated that, having reviewed the appellant's bundle and compared them with the original medical records received by the representatives:

> "I am unable to find any discrepancies between the records we received and the records reproduced in the appellant's bundle. Consequently, I submit that there has been no omission of the medical records as received from the GP".

35. As Mr Bates pointed out, at para 9 of the witness statement Mr Hasani fails to say whether the GP in fact sent all the medical records held on the appellant. All he can say is that they requested the medical records and the bundle of documents sent to the representatives is reflected in the bundle presented to the First-tier Tribunal.

36. Mr Bates did not seek to object to the admission of this new evidence which I admit under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as relevant to the error of law issue.

37. The evidence, in my judgment, discloses unfairness and procedural irregularity by the judge. He relied upon an omission in the bundle without raising it with the legal representatives at the hearing. It may well be that

the discrepancy only became apparent to him after the hearing. However, fairness required that this matter, if it was to form a significant reason for disbelieving the appellant, should have been raised with the legal representatives so that they would have an opportunity to deal with it. As, of course, Mr Hasani does in his witness statement. Had that been raised before the judge, it is difficult to conceive that the judge could have inferred that the appellant herself had deliberately (and therefore dishonestly) withheld part of her medical records in order to avoid being 'discovered' in a lie about the GP's dealings with her following the conception of her second child.

38. As I have said, the judge made a very strong finding based upon inference that she had deliberately misled the First-tier Tribunal. I see no reason not to accept what is said by Mr Hasani, who is a solicitor, and has an obligation to not mislead the Tribunal. Clearly, the appellant had no dealings with her medical records and was not in a position, therefore, to deliberately withhold them. There appears to have been some oversight either by the GP in providing all the documents or in the legal representatives noticing that not all the medical records were in the bundle. However, of course, the importance of that omission would only have become apparent if the point had been raised as a live issue at the hearing. It was not. As a result of that, the judge's reasoning in para 38 is unsustainable and, indeed, arises from unfairness.

39. Whilst I acknowledge that there are a number of reasons given by Judge Bonavero for his adverse findings, including relying upon Judge Malik's reasoning which he sets out at para 24 of the decision in this appeal, I am satisfied that the approach of the judge in paras 37 and 38 in particular in reaching an inference that the appellant has acted deliberately and dishonestly in her dealings with the Tribunal, materially affected his approach to the appellant's evidence and her credibility.

40. Consequently, I accept Ms Sanders' submissions under grounds 1 and 2. I further accept that it is established, on the basis of those grounds, that the judge materially erred in law in reaching his adverse credibility finding.

41. I have reached that conclusion without the need to resolve ground 3 because, even if ground 3 is not sustained, the errors in grounds 1 and 2 lead me to conclude that Judge Bonavero's adverse finding cannot stand.

Decision

42. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

43. In the light of the error of law, none of Judge Bonavero's findings can stand. The appeal must be reheard *de novo* before a judge other than Judge Bonavero.

44. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judges Bonavero or Malik.

Signed

Andrew Grubb

Judge of the Upper Tribunal
2 August 2021