IAC-AH-SAR-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/01663/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 30th September 2014

Decision & Reasons Promulgated
On 28th October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS SKN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Nicholson, Counsel
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uganda born on 14th April 1977. The Appellant first entered the United Kingdom on 20th September 2004 on a voluntary worker visa remaining for one year before returning to Uganda. She re-entered on 8th November

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2006 on a working holiday visa for two years and on 29th January 2009 was issued with an EEA family residence permit valid to 29th January 2014. The Appellant claimed asylum on 31st May 2013. The claim for asylum was based upon a fear that if returned the Appellant would face mistreatment due to a reason not covered by the Convention, namely that she would not have access to the medication and treatment she needed for her HIV and mental health condition. Her claim for humanitarian protection was based upon a fear that if returned she would face a real risk of inhuman or degrading treatment or punishment and she also claimed that removing her to Uganda would be a breach of Articles 2, 3 and 8 of the European Convention of Human Rights.

2. On 27th February 2014 the Secretary of State issued a reasons for refusal letter.

3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Cruthers sitting at Manchester on 19th May 2014. In a determination promulgated on 21st May 2014 the Appellant's appeal was dismissed on all grounds.

4. On 21st May 2014 the Appellant lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended firstly that there had been a failure by the First-tier Tribunal Judge to consider Article 3 of the European Convention of Human Rights and secondly that the judge had failed to consider private life under Article 8.

5. On 20th June 2014 Judge of the First-tier Tribunal Ievins granted permission to appeal. Judge Ievins noted that there were two Grounds of Appeal and that the first was that the judge erred in law in considering whether or not the Appellant was a suicide risk. He considered that ground to be arguable. He noted that a number of matters were raised on the Appellant's behalf which might be thought to be a disagreement with the conclusions reached by the judge. However, the judge referred to the six considerations set out in the case of *J [2005] EWCA Civ 629* but he did not set out his answers to the six tests. Judge Ievins states that the First-tier Tribunal Judge set out the evidence under elements (a) to (e) and then concluded that from the summary of that evidence "*it is clear that this appeal cannot succeed on the test explained in J*". Judge Ievins was of the view that the First-tier Tribunal Judge did not explain why and did not appear to make findings on those six tests and that that failure amounted to an arguable material error of law.

6. The second ground upon which permission to appeal was granted related to the consideration of Article 8 outside the Immigration Rules. Judge Ievins considered that from paragraph 41 onwards the judge appeared to be assessing proportionality with reference to the legitimate aim as "*the public interest in proper immigration control*". He stated that the public interest in proper immigration control is not one of the grounds justifying an interference with a person's Article 8 rights set out in Article 8(2). He considered that it was arguable that in failing to follow a structured five stage approach as required by *Razgar* but instead by addressing his mind relatively swiftly to proportionality the judge had also fallen into arguable material error of law.

7. On 1st July 2014 the Secretary of State responded to the Grounds of Appeal under Rule 24. In that response the Secretary of State notes that the First-tier Tribunal Judge may not have directly applied the facts as highlighted by the Court of Appeal in *J* to the facts of this Appellant's case but contended that that was immaterial on the basis that it was clear what was being suggested. The feared ill-treatment clearly did not meet the minimum level of severity as the Appellant denies any current thoughts of self-harm. The Secretary of State argues that a causal link has not been established between the act of removal and the ill-treatment (suicide risk). The Secretary of State points out that the Appellant was not pursuing her application for asylum and therefore could not demonstrate that her fear was objectively well-founded and she clearly has a support network within Uganda that she could call upon on return. The judge having been informed that she had no right to remain under Appendix FM was also entitled to find that the Appellant's Article 8 application could not succeed as no compelling circumstances had been identified warranting consideration outside of the Rules.

8. It is on this basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel Mr Nicholson. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussions

9. Mr Harrison starts by indicating that he relies on the Rule 24 response. Mr Nicholson replies by stating that both assessments under Articles 3 and 8 are wrong. He acknowledges that it is accepted that this is an Appellant who has severe health problems but that the judge has thereafter failed to go through the relevant factors and give reasons. He points out there are six factors under *J* which need to be considered but that the fifth is amended by the decision of the Court of Appeal in *Y and Another (Sri Lanka) v Secretary of State for the Home Department (29th April 2009)*. He refers me to paragraph 14 to 18 therein of the judgment of the Court of Appeal submitting that the test of fear is a subjective test, i.e. one real to the Appellant, and that the judge did not address this in rejecting *J*.

10. Further, addressing the Appellant's claim under Article 8 Mr Nicholson submits that again the judge has failed to properly address the issues and that the decision in *Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)* is correct and that the Appellant's claim must be looked at in the round. He states as there is no Rule within the Immigration Rules on Article 8 relating to a claim based on health, it is necessary to look at it outside the Rules.

11. Mr Nicholson contends that by giving due consideration to the decision in *Akalu* and to the consultant forensic psychiatrist's report of Dr Chandra Ghosh to be found in the First-tier Tribunal bundle, the issues raised by the Rule 24 response as to there being no causal risk has been addressed and he asked me to find that there has been an interference with the Appellant's private life that is disproportionate. He submits that this case is about whether or not the Appellant can avail herself of treatment in

Zimbabwe and that that is doubtful and costly and that the lack of monitoring that takes place in Zimbabwe is critical. He submits there are no countervailing issues in this matter such as deportation, criminality, overstaying, etc., and that this is a case that is in line with the decision in *Akalu* and that it should be allowed.

12. Mr Nicholson goes on to submit that there is nothing to suggest that the Appellant's church could help her in her home area and in any event the church cannot look after her medical needs. He points out that Judge Cruthers in his determination has at paragraph 50 acknowledged there is a stigma attached to the Appellant's health that the judge has merely failed to conclude that this is "*not a trump card*". He submits that there is an error in the judge's approach to Article 8, that he has failed to follow *Akhalu*, has not approached the Article 8 test. He contends that not everyone is at risk of suicide and that the judge has failed to distinguish it from the general case analysis. He asked me to find there is a material error of law and to set aside the decision of the First-tier Tribunal Judge.

13. Mr Harrison reiterates his initial comment that he relies on the Rule 24 response stating that the determination is well-balanced and that he disagrees with the analysis with regard to the decision in *Akhalu* for when the judge draws his conclusions together at paragraph 32 onward he submits the judge has considered a vast amount of evidence and that the conclusions the judge has reached were open to him and ones that he was entitled on the evidence before him to make.

14. Mr Nicholson responds by asking me to read paragraphs 32 to 39 of Judge Cruthers' determination pointing out that paragraph 39 is only six lines long and that he submits the judge has failed to draw conclusions which he states that he should have done. He submits that the judge is just looking at the factors and has not made any findings at paragraphs 44 onwards. He points out that paragraph 51 is about *N* and not a conclusion and in any event he agrees with the judge that the threshold in *N* would not be reached although he points out that *N* was not an Article 8 health case.

The Law

15. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

16. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him.

Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Relevant Case Law

17. I have considered the relevant case law in particular:

Y and Another (Sri Lanka) v Secretary of State for the Home Department – 29th April 2009

Sedley LJ:

The fifth principle, it will be recalled, is that:

> *"In deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of Article 3".*
>
> *"… One can accordingly add to the fifth principle in J but what may nevertheless be of equal importance is whether any genuine fear which the Appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return".*

MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279

> *"23. The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8".*

Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC)

> *"(1) MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279 does not establish that a claimant is disqualified from accessing the protection of article 8 where an aspect of her claim is a difficulty or inability to access health care in her country of nationality unless, possibly, her private or family life has a bearing upon her prognosis. The correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases.*

> (2) *The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in removal*".

Findings

18. Mr Nicholson has spent a very considerable amount of time quite properly taking me through the authorities and contending that the authorities of *Y* and *Akhalu* impose a lower threshold than that in *N*. The question for me is whether or not the judge has carried out a proper analysis of the law, applied the correct test and made findings which he was entitled to and in the event that he has not as to whether or not such error is material. The question has to be considered as to whether or not the submissions made by Mr Nicholson – eloquently put as they are – amount to nothing more than mere disagreement and argument. The decision of Judge Cruthers is well-structured. Firstly he addresses the issues and law applied, and thereafter goes on to consider the general law and the authorities. He addresses the essence of the Appellant's case and at paragraph 12 gives due and full consideration to the Court of Appeal decision in *J*. He sets out the particular considerations for determining whether there is a real risk in a case based on a claimed risk of suicide and thereafter goes on to consider *N* and at paragraph 14 notes (as stated above in this determination) the full head note of *Akhalu*.

19. Judge Cruthers then considered the documentary evidence and the submissions and at paragraphs 32 to 39 considers the Appellant's claim to be a suicide risk. Mr Nicholson contends that the judge has failed to answer the relevant questions set out by the Court of Appeal. However that is not my interpretation. Paragraphs 33 to 38 consider the relevant elements and whilst paragraph 39 is, as Mr Nicholson submits, short the judge does give due and proper consideration to the test to be applied. Whilst the judge does not specifically set out as to why the test cannot succeed under *J* he does state he agrees with what is said regarding the Appellant's claim in paragraphs 36 and 37 of the Notice of Refusal as expanded by the Home Office Presenting Officer in his submissions at the hearing. The judge has therefore endorsed what is said in a very detailed and well-constructed Notice of Refusal and given due consideration to the tests in *J*.

20. Paragraphs 36 and 37 address whether the Appellant's removal will create or exacerbate a risk of suicide considering the apparent thoughts of suicide that the Appellant had had on a number of occasions and the sleeping tablets that she took in 2011. Further, paragraph 37 goes on to analyse the principles in *J* in some detail and includes that the Appellant has not reached the threshold required. Those factors are considered by the First-tier Tribunal Judge after further expansion of them in submission by the Home Office Presenting Officer. The judge has made findings that he is entitled to and has fully engaged with the principles set out in *J*. Further, whilst

the judge has done no more than refer to the head note in *Akhalu* it is clear he is mindful of it and he has looked at this case as is clear from the determination by reference back to the Notice of Refusal in a test of the Appellant's objective fear as expounded in the authority of *Y*. Whilst *Y* is not specifically referred to, the judge's approach has been correct and therefore does not disclose any material error of law.

21. The second limb of the appeal challenges the manner in which Articles 3 and 8 generally have been considered. The judge has given due and proper consideration as set out in very detailed paragraphs from paragraph 40 to 51 of his determination. He has given due consideration to factors in the round as set out in *Akhalu* and has in fact gone so far as to refer to that authority at paragraph 43. The judge has carried out a very detailed and considered analysis of the Appellant's health and the support that she has and despite the submissions of Mr Nicholson to the contrary I find that the judge has looked at all the relevant factors and made findings of fact that he was entitled to. He had looked at the case subjectively, which is the correct approach as set out in *Akhalu*, and has taken the evidence and come to conclusions that he is entitled to reach. Merely to submit, as Mr Nicholson does, that the findings are short, does not mean the findings are not ones to which the judge was entitled to reach. In fact as for the reasons set out above the judge's findings are not short and are detailed and ultimately the submissions amount to little more than disagreement with the judge's determination. This is a determination that has been well-reasoned and the law fully and properly considered. It discloses no material error of law and the Appellant's appeal is consequently dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal is dismissed and the decision of the First-tier Tribunal is maintained.

The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application is made to vary that order and none is therefore made.

Signed	Date
Deputy Upper Tribunal Judge D N Harris	28th October 2014