Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/00826/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 20th August 2015	**On 9th September 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON
AND JUDGE M HUTCHINSON

Between

J M

Appellant

And

Secretary of State

Respondent

Representation:
For the Appellant: Ms Todd, Solicitor
For the Respondent: Ms O'Brien, Senior Presenting Officer

DECISION AND REASONS

1. Pursuant to an interlocutor dated 28 May 2015, the Court of Session found that the Upper Tribunal (UTJ MacLeman) erred in law by failing to find that the First-tier Tribunal (Designated First-tier Tribunal Judge Murray) erred in law by (a) failing to take account of the whole terms of the medical form from the Cure Medical Centre and Laboratory Service relating to the appellant's attendance there on 20 October 2007, including what was noted regarding physical condition, and (failing to explain the relevance, if any, of the results of the HIV tests referred to in its reasons).

The Court remitted the appeal to the Upper Tribunal to proceed as accords.

2. This interlocutor was made after consideration of the terms of a Joint Minute whereby the parties are concurred in moving the Court.

3. As it is of assistance, we set out the terms of that minute.

"(1) The appellant claims to be in fear of serious harm if returned to Uganda by persecutors who seek to locate and harm her brother. She claims to have suffered persecution in the past by reason of this. In Particular, the appellant claims to have been raped on two occasions. Her claim for asylum was refused by the Secretary of State for the Home Department. She appealed to the First-tier Tribunal (Immigration and Asylum Chamber) referred to oftentimes as an "Immigration Judge").

(2) The appellant produced what purported to be a medical report dated 20 October 2007 ("the medical report"). *Ex facie*, this would have related to the second occasion when the appellant claimed to have been raped. That medical report narrated a complaint of rape by the appellant, and the presence of physical injuries of a kind that indicated that rape had occurred. The terms of that medical report, if accepted, were capable of lending credence to the appellant's account of having been raped.

(3) The First-tier Tribunal in its decision of 24 May 2013 found that the appellant's claims were not credible and that she would not be at real risk if returned to Uganda. In particular, the First-tier Tribunal did not accept the appellant's account to have been raped on two occasions (para. 55).

(4) The First-tier Tribunal did make some reference to the medical report, but did not note its terms beyond that it was said in the report that the appellant was not found to be HIV positive, whereas a later test found her to be HIV positive (para 53). No reference was made by the Tribunal to the physical injuries noted in the medical report. The Tribunal did not discuss whether the terms of the report were accepted, or why the appellant's account of having been raped should be rejected notwithstanding its terms. The Tribunal did not explain what bearing, if any, the results of the HIV test had on the issues before it.

(5) Permission to appeal was granted to the Upper Tribunal. Ground 5 included the following:

> "Failure to take into account relevant evidence - at paragraph 55 the Immigration Judge dismisses the appellant's account of being raped several [sic – two] times in Uganda … She fails to make mention of the medical report which was capable of verifying at least one of the incidents. This is in error of law."

(6) The Upper Tribunal ought to have upheld Ground 5 insofar as the Upper Tribunal ought to have found that the First-tier Tribunal failed

to consider a medical report which was capable of lending credence to the truth to the appellant's statement that she had been raped on the second occasion claimed. It should therefore have found that the First-tier Tribunal the making of the decision appealed against "involved the making of an error on a point of law" (Tribunals, Courts and Enforcement Act 2007, s12(1)).

(7) Instead the Upper Tribunal in its decision of 10 January 2014 held:

> "As to ground 5, the relevant medical report is mentioned in some detail. There was an abundance of material before the judge, and she did not have to expound on this particular aspect to any greater extent that she did." (para. 27)

(8) The procedural judge of the Inner House, when granting permission to appeal to the Court of Session, observed that:

> "I consider that this response by the Upper Tribunal does point to a complete failure by the Upper Tribunal to address the ground of appeal and properly consider the issue." (Opinion of 26 November 2014)

(9) The procedural judge's observation was correct. It might be the Upper Tribunal had confused the medical report of rape with certain psychological evidence authored by Dr Copstick, referred to by the Upper Tribunal at paras. 23 and 24. Whatever the thinking the Upper Tribunal might have been, the fact is that the Tribunal was not correct to say that the relevant medical report was referred to in some detail. Rather, the only detail mentioned was that the appellant was not found at the time to be HIV positive. It is difficult to understand what possible bearing that could have on determination of the case; The First tier Tribunal did not explain what, if anything, it took from that. In any event the First-tier Tribunal's reference to the HIV test was not an adequate consideration of the report's terms.

(10) The effect of remitting the case to the Upper Tribunal to find that the First-tier Tribunal erred in law and thereafter to proceed as accords will be as follows. The Upper Tribunal must consider whether to set aside the decision of the First-tier Tribunal (Tribunal, Courts and Enforcement Act 2007, s.12(2)(a)). If it does set aside the decision, it must then decide whether to remake the decision itself or remit the case to the First-tier Tribunal (s.12(2)(b)). The appropriate disposal of the case will depend on a variety of considerations including the materiality of the error of law. The appropriate disposal of the appeal to the Upper Tribunal is a discretionary matter (as is the disposal of this appeal to the Court of Session) (*Saber v Secretary of State for the Home Department* 2008 SC (HL) 132). It is expedient that once the error of law regarding the medical report has been corrected, it is left to the specialist tribunal to decide what further procedure would be apt in this case.

4. By way of background, the appellant is a national of Rwanda and was granted refugee status in Uganda in December 2009 where she had arrived some three years previously. She claimed to have unlawfully entered the United Kingdom on 24 January 2012. She claimed asylum on

21 February 2012. On 11 January 2013 she was served with notice of a decision to remove her as an illegal entrant, her asylum claim having been refused. That claim was based on a fear from the Rwandan authorities who had pursued and ill treated her in Uganda. The Respondent did not accept this account of adverse interest which the appellant had claimed had been based on the activities of her brother.

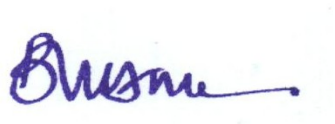
5. As well as the Refugee Convention, the grounds relied in the appeal to the First-tier Tribunal included a consideration of the claim that the appellant had been trafficked, Articles 2 and 3 as well as Article 8 based on the appellant's private life in the United Kingdom.

6. After considering submissions from the parties who were in agreement as to the approach to be taken, we set aside the decision of the Upper Tribunal in the light of the error of law identified in the interlocutor. As to the remaking of the decision, having regard to the findings of fact that are required to be made, the proper course is for the case to be remitted to a differently constituted First-tier Tribunal. Ms Todd confirmed that the extent of the remaking will be confined to grounds under the Refugee Convention and Article 8, the claim based on trafficking no longer being pursued and likewise Articles 2 and 3 not being relied on.

7. It will be for the First-tier Tribunal to give directions for the future conduct of the appeal. However, we make these observations. As acknowledged by Ms Todd, the most recent evidence of adverse interest by the Rwandan authorities and its nationals who are living in Uganda is a reference to a journalist encountering harm in 2011. It will be necessary having regard to the nature of the challenge raised in the decision letter by the Respondent to consider whether the Ugandan authorities are able to offer a sufficiency of protection if it is established that the appellant was subject to that adverse interest as claimed. A further matter that will need to be addressed relates to the explanation by the appellant in the SEF that her three children who are understood to be currently living in Uganda were born there in 2000, 2001 and 2003. This is in the context of the appellant's case that she did not move to Uganda until 2006.

8. By way of summary therefore the decision of the First-tier Tribunal is set aside and the case is remitted for its further consideration pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007.

Signed Date 26 August 2015



Upper Tribunal Judge Dawson