



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04933/2014

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons

On 15 January 2016

**Promulgated
On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

**MKH
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bundock, counsel instructed by Lawrence Lupin Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is an appeal against a decision of FTTJ Bell, promulgated on 14 July 2015, in which she dismissed the appellant's appeal against a decision to refuse to grant her asylum.

Background

2. The appellant entered the United Kingdom during 2001 and thereafter remained in the United Kingdom without leave. On 29 October 2012, she

applied for asylum on the basis that she would be persecuted in Jamaica as a lesbian and on account of her poor mental health. The Secretary of State refused the appellant's asylum application on the grounds that she was not a lesbian and therefore was not previously persecuted in Jamaica and would not be at risk if removed there now. The respondent accepted that the appellant had attempted suicide and been diagnosed with PTSD and depression, but considered that medical treatment was available in Jamaica and did not accept that there would not be a support network available there. It was not accepted that the appellant's suicidal ideation met the relevant legal tests. With regard to Article 8 ECHR, it was not accepted that the appellant had a partner in the United Kingdom or that she had no ties to Jamaica.

3. During the course of the hearing before the First-tier Tribunal, the FTTJ heard only submissions from the representatives. The appellant's Community Psychiatric Nurse wrote to say that the appellant was too mentally unwell to attend. Psychiatric reports were submitted on the appellant's behalf, however there was no witness statement from her. The FTTJ dismissed the appeal on credibility grounds; rejected the claim that she was at real risk of suicide as well as concluding that none of the requirements of the Rules, in relation to the appellant's private and family life, had been met.

Error of law

4. Permission to appeal to the Upper Tribunal was sought on the basis that it was arguable that the FTTJ's approach to credibility of the appellant's claim was irrational; that the wrong standard of proof was applied to the risk of Article 3 ill-treatment and that the FTTJ failed to carry out an Article 8 assessment outside the Immigration Rules, to make a proportionality assessment or to apply the relevant Immigration Rules. A query was also raised as to whether the FTTJ had a complete copy of a psychiatric report on the appellant, which included the psychiatrist's opinion and recommendations.
5. The Deputy Upper Tribunal Judge granting permission did so on all grounds; particularly noting the *"importance of ground 2 and the irreversible harm that may follow as it is arguable that the correct standard was not applied."*
6. The Secretary of State's response of 9 October 2015 opposed the appeal, arguing that the FTTJ directed herself appropriately and made reasonable, sustainable, findings. It was asserted that the medical evidence confirmed that the appellant was not actively suicidal and therefore the FTTJ's findings on the risk of suicide were properly made.

The hearing

7. At the outset, Mr Melvin submitted an expanded Rule 24 reply. Mr Bundock had no objection. I advised the representatives that the psychiatric report

before the FTTJ was indeed missing several pages including the doctor's opinion and recommendations.

8. Mr Bundock began his submissions on what he considered his strongest point, that of the FTTJ's self-direction in relation to the standard of proof for the appellant's Article 3 claim. In essence, the FTTJ twice referred to the need for the appellant to establish on "*the clearest possible evidence*" the existence of a real risk of suicide. There was also a failure by the FTTJ to follow binding case law in her approach to assessing the appellant's risk of suicide.
9. Moving on the first ground, he argued that the FTTJ had done no more than pay lip service to the medical evidence before her and had failed to take that evidence into consideration when assessing the various credibility issues. With regard to the third and final ground, Mr Bundock said that the FTTJ had failed to consider the appellant's Article 8 claim either within or outside the Immigration Rules. He argued that paragraph 276ADE(vi) applied.
10. Mr Melvin argued that the FTTJ assessed the medical evidence, which was before her and credibility was a matter for the judge. The FTTJ heard no oral evidence from appellant; took into account interview records; that the appellant had not produced any evidence and that the person whom the appellant claimed to be in a relationship with had obtained her status on the basis of a heterosexual relationship with an EEA national. He argued that the challenge was no more than a disagreement with the findings of the judge. A medical complaint did not excuse an appellant of discrepancies or "*outright lies.*" He asserted that the appellant was wishing to hide behind her medical condition; that the credibility findings were sustainable and the core of the appeal had no merit.
11. With regard to the second ground, Mr Melvin conceded that the FTTJ failed to note the case law in J v SSHD [2005] EWCA Civ 629; Y and Z v SSHD[2009] EWCA Civ 362 or KH (Afghanistan) [2009] EWCA Civ 1354 EWCA, however he asked me to find that the judge addressed the necessary issues and the FTTJ noted that treatment was available in Jamaica. As regards the appellant's subjective fear of ill-treatment in Jamaica, he asked me to note that her circumstances were very different from that of the complainants in Y and Z. Mr Melvin argued that there did need to be the clearest possible evidence and that was the same as a real risk.
12. In relation to the third ground, Mr Melvin argued that the FTTJ did not need to make reference to the case law as long as a proportionality assessment was carried out. There was no evidence of a family or private life and it was hard to see that any other judge would allow the appeal on this basis. The FTTJ had considered the appellant's physical and moral integrity. Her failure to refer to Razgar was not material to the outcome.
13. With regard to paragraph 276ADE(vi) of the Rules, Mr Melvin argued that

the appellant did not meet the suitability requirements at 276ADE(i) therefore did not get to (vi).

14. At this juncture, I note that it was never part of the respondent's case hitherto that the appellant failed to meet the suitability requirements of the Rules. Indeed there is no such allegation in the reasons for refusal letter before me.
15. In reply, Mr Bundock argued that the appellant has a claim under and outside Rules and that the route under the Rules, of very significant obstacles, was not considered by the FTTJ. There was also a private life claim outside the Rules based on 12 years unlawful residence and longstanding treatment and care for mental health issues.
16. At the end of the hearing, I announced that the FTTJ had made material errors of law and set aside her decision in its entirety. My reasons are as follows.
17. The FTTJ at [36] noted that the appellant's mental health was deteriorating at the time of her asylum claim and interview. At [54] the FTTJ says, "*there may well be events in her past that have triggered her mental health problems.*" However, the FTTJ rejects the credibility of the appellant's claim from [38] to [48] of the decision and reasons, mainly relying on issues identified by the respondent in the reasons for refusal letter. Other than saying, three times, that the discrepancies cannot be adequately explained by the appellant's mental health issues, the FTTJ did not engage with the medical evidence as to the extent of the appellant's mental ill-health when interviewed in Yarl's Wood IRC, at length, regarding her asylum claim. There was also a failure to truly take into account the appellant's admission to hospital and suicide attempts. The FTTJ did not genuinely engage with the impact the appellant's mental health may have had on her ability to provide a clear, consistent account. The FTTJ also refers to the appellant's replies in interview as "*vague*" but there is no consideration that this might have been as a result of her illness. For the foregoing reasons, I find that the FTTJ's credibility findings were unsound.
18. The FTTJ also erred in relation to the test she employed when assessing the risk of suicide in this case. It is trite law that the test she ought to have employed is that of a "real risk." Instead, as stated above, the FTTJ twice used the phrase, at [51] and [55], of "*clearest possible evidence.*" This is not the test. Furthermore, the FTTJ did not cite or apply the six-stage test in J or the modification to the fifth principle in J, which emerged from Y and Z. The fifth principle is particularly important in the appellant's case where there may, ultimately, be no objective foundation to the source of the suicide risk. The FTTJ made no specific findings as to the appellant's subjective fear despite accepting that she was very unwell, historically suffered from psychosis, had made previous suicide attempts and had ongoing psychotic symptoms.
19. While it was the responsibility of the appellant's solicitors to furnish the

FTTJ with a complete report, it is obvious that the copy in the appellant's bundle was incomplete and lacking an opinion and recommendations. The complete psychiatric report refers to the doctor's opinion that removal to Jamaica was likely to increase the risk to the appellant by way of further suicide attempts. Therefore while the FTTJ could not be expected to consider evidence not before her, the full content of this report indicates that it is far from inevitable that another judge would reach the same conclusion as to Article 3.

20. At the time of the hearing before the FTTJ, paragraph 276ADE(vi) of the Rules referred to a test of "*very significant obstacles*" to integration rather than an applicant having "*no ties.*" The FTTJ did not consider the appellant's circumstances in relation to the relevant test. She erred materially in this regard, given the appellant's accepted vulnerability.
21. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be remade. None of the findings of the FTTJ are to stand.
22. Further directions are set out below.
23. An anonymity direction was made by the FTTJ. I consider it appropriate for anonymity to be continued and therefore make the following anonymity direction:

"Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. "

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision to be re-made.

Directions

- This appeal is remitted to be heard de novo by any First-tier Tribunal Judge except FTTJ Bell.
- The appeal should be listed for a hearing at Birmingham IAC.
- Time estimate is half a day.

Signed

Date: 17 January 2016

Deputy Upper Tribunal Judge Kamara