Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02958/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2016	**On 7 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ASA (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Macdonald QC, Counsel instructed by Farani, Javid &Taylor Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing her appeal against the decision of the Secretary of

State to refuse to recognise her as a refugee, or as otherwise requiring international or human rights protection.

The Reasons for the Grant of Permission to Appeal

2. First-tier Tribunal Judge Pedro granted the appellant permission to appeal on two grounds for the following reasons:

> 1. The appellant is a citizen of Pakistan born on [ ] 1987 and seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Kamara promulgated on 31 March 2016 to dismiss her appeal against the decision of the respondent dated 17 November 2015 to refuse her protection claim.
>
> 2. Ground 1 asserts that the judge failed to consider evidence before her, being two witness statements each dated 14 March 2016, as indicated at [23,34]. These two statements appear to have been received by the Tribunal on 15 March 2016 but it is unclear whether or not they were placed before the judge for the hearing on 17 March 2016. If they were not, this may have resulted in unfairness. On the other hand, they may have been overlooked by the judge. As the absence of these statements was referred to by the judge, this does disclose an arguable error.
>
> 3. Ground 2 challenges the judge's interpretation and his findings relating to the medical evidence, but I find no merit in this ground. It amounts to no more than a disagreement with findings of the judge which were open to her and the weight to be given to the medical evidence was a matter for the judge.
>
> 4. Ground 3 asserts that the judge should have taken into account in the proportionality balancing exercising under Article 8 her own finding that the appellant had not practised deception and had not fallen foul of the immigration rules. I find this does raise an arguable error.
>
> 5. I grant permission on grounds 1 and 3, but refuse permission on ground 2.

Relevant Background

3. The appellant entered the United Kingdom on 20 January 2011 with a student visa which was valid until 30 September 2012. The visa was issued in order to be able her to study for an MBA in Banking at Holborn College. On 19 September 2012 she sought leave to remain as a Tier 4 General Migrant. In the interim, she was awarded an MBA by the University of Wales. While her application for leave to remain was pending, on 8 October 2014 she was detained for a Section 10 removal, as it was alleged that she had obtained a TOEIC certificate by fraud. She was not given an in-country right of appeal against the decision to remove her, or against the decision to refuse her application for leave to remain. The appellant commenced judicial review proceedings, which were still pending at the time of the hearing in the First-tier Tribunal.

4. The appellant applied for asylum on 29 June 2015. In brief, the appellant's claim was that she had a well-founded fear of persecution on return to Pakistan because she was a lesbian. She said she had been in a long-term lesbian relationship with a female, S1, in Pakistan from the age of around 16 or 17 to when she left Pakistan at the age of around 23. S1 was the daughter of one of her maternal uncles. Two or three years into the relationship, S1's mother caught the appellant and S1 engaged in sexual activity. The appellant was beaten by her mother and grandfather and sustained an injury to her chin. Thereafter, the appellant was unable to see S1 as often, as her mother was keeping an eye on her. She decided to come to the United Kingdom. She was able to leave without her parents' knowledge and she left late at night via the back door. If she had told her parents she was planning to leave the country, they might have killed her or forced her into marriage.

5. The appellant had had two long-term relationships in the United Kingdom and a number of one night stands. Her relationship with A had lasted around a year and ended when A inexplicably left without telling the appellant and switched off her mobile telephone. The other significant relationship was with S2, which lasted from 2013 until 2015. The appellant said she had received anonymous threatening telephone calls and threatening emails in the United Kingdom. She feared that her uncles who had been to prison and who were involved in politics would kill her if she returned to Pakistan. She had attempted to harm herself in the United Kingdom during 2015, before applying for asylum, and she had made a similar attempt at self-harm in Pakistan during 2009.

6. The asylum claim was rejected on credibility grounds by the Secretary of State in a letter dated 17 November 2015. At paragraph 46 of the refusal letter, the Secretary of State addressed paragraph 339L of the Rules. She had failed to provide a consistent account outlining the reasons why she feared returning to Pakistan. Moreover, it had been concluded the English language tests she completed in order to study in the UK were completed by a proxy user and it was considered she had used deception in order to gain leave to remain in the UK. In addition, it was not considered she had made an asylum claim at the earliest possible time.

The Hearing before, and the Decision of, the First-tier Tribunal

7. Both parties were legally represented before Judge Kamara. Mr Macdonald QC appeared on behalf of the appellant. The judge received oral evidence from the appellant and from Ms A, who had provided a signed letter dated 10 June 2015. In that letter, she said that the appellant was a very dear friend of hers and that both of them were lesbian. She knew that the appellant's sexual identity was lesbian as they had had a few one night stands together, and she also used to attend LGBT parties. The last time she had visited, she had found her in a very miserable condition. She had taken an overdose of painkillers, and so she had taken her to hospital.

8. In her subsequent decision, Judge Kamara gave her reasons for rejecting the appellant's claim to be a lesbian or at risk of forced marriage in paragraphs [18] to [35]. She began by explaining why she attached little or no weight to various items of documentary evidence relied on by the appellant, including emails, medical documents, whatsapp messages and photographs.

9. At paragraph [23] she said she had placed no weight on the evidence of Ms A. She noted there was no witness statement from her and that her letter at page 97 of the bundle did not contain her address or any means of identification: "accordingly, the respondent was at somewhat of a disadvantage."

10. Ms A showed her evidence that she was a recognised refugee in the United Kingdom. She told the judge that her claim was based on domestic violence at the hands of her former husband.

11. The judge asked Ms A when she had visited the appellant on the occasion she said she had taken an overdose: "her response was evasive in the extreme and despite being asked three times, she was entirely unable to tell me when this was."

12. At paragraph [26], the judge said that the appellant had provided an account, particularly in the unsigned undated statement in the bundle, which was rich in sexually explicit detail, yet there were a number of matters which caused her to conclude that the appellant's account was a work of fiction from beginning to end. She added that the witness statement was written in English but was not of the same standard as that of the appellant's spoken English. Furthermore, the statement focused repetitively and somewhat unnecessarily on details of sexual acts between the appellant and her claimed partners. She bore in mind that a detailed and consistent account could also be a false account. Details of some but by no means all of the matters which caused her to reject the appellant's account in its entirety were set out below.

13. At paragraph [27], the judge said that during her interview the appellant maintained that she was able to obtain a CAS, a visa and leave Pakistan without the knowledge of her family. Furthermore, she stated that none of her family knew where she was until 2013. However, in the lengthy unsigned statement in the appellant's bundle, it was claimed that the appellant's mother had assisted her to leave Pakistan, including helping her with her visa application and arranging transport for her trip to the airport. The appellant was unable to satisfactorily explain this discrepancy during cross-examination.

14. At paragraph [28], the judge said that the appellant had consistently stated that her mother knew of her sexuality long before she left Pakistan in 2011 and she relied upon a denunciatory letter from her mother obtained shortly before the asylum application was made. The bundle contained a declaration by the appellant's mother which the appellant had

originally produced in support of her application for leave to remain under Tier 4. The mother undertook to sponsor her daughter's expenses during her stay in the United Kingdom. That declaration was dated 30 October 2013. Attached to that declaration was a letter from the Pakistani Ministry of Finance confirming that the appellant's mother had deposited 5 million rupees at the Namakmandi National Savings Centre. The existence of these documents was a further reason not to place weight on the 2015 letter from the appellant's mother. It made no sense for her to write criticising the appellant's alleged lifestyle and cutting her off in 2015, when it did not trouble her in 2013 when she was prepared to put considerable funds at her daughter's disposal for her foreign education.

15. At paragraph [29], the judge held that the appellant's account of when she realised her sexual identity had varied. In her screening interview she said this was when she was aged 17. Yet in her asylum interview she said this was when she was aged 10. At the hearing, she told the judge it was not until she was 18 or 19. The judge held these inconsistencies were not credibly addressed when they were put to the appellant.

16. At paragraph [30], the judge said that the appellant's account as to how long she was in a relationship with S1 had varied. During her asylum interview, she initially said their relationship lasted for seven years. But minutes later she said it lasted almost five years.

17. At paragraph [31], she said that the appellant's claim of being caught in sexual activity with S1 on one occasion as they forgot to lock the door appeared somewhat unlikely. It was even more unlikely that she and S1 were able to continue the relationship, including spending nights together and truanting from school together for some years afterwards. Indeed, contradicting herself, the appellant stated during her interview that her mother never left them alone at night after they were caught.

18. At paragraph [32] the judge observed that the appellant was asked during her asylum interview to state which people in Pakistan knew of her sexuality. She mentioned only S1, S1's mother and the appellant's mother. But in the unsigned statement, the appellant mentioned that a friend in Pakistan by the name of Sonia knew of the relationship, and also that the appellant's sister was aware. The judge said she had had no explanation as to why the appellant had not mentioned Sonia and her sister during her interview.

19. At paragraph [34], the judge said the appellant claimed that she had two serious longstanding relationships in the United Kingdom with women she was introduced to via mutual friends. Furthermore, she claimed to have had a number of flings. However, despite living in the United Kingdom for over five years, apart from Ms A whose evidence she rejected, no other person had written a letter on her behalf or had attended the hearing to support her claims.

20. At paragraph [35], the judge observed that the appellant arrived in the United Kingdom in 2011 at least partially, according to her account, to obtain international protection owing to her sexuality and to avoid a forced marriage. Instead of seeking asylum she pursued her studies and sought further leave to do so. Even when the appellant was detained with a view to imminent removal, she made no mention of fearing to returning to Pakistan. Instead she launched a judicial review of the removal decision. It was only after several months "and after what I considered to be a cynical collation of evidence," that the appellant made her asylum application. The appellant claimed she did not know about asylum, but this claim was unlikely given her level of education and her facility in English as well as her familiarity with immigration processes. Furthermore, Ms A was a recognised refugee and claimed to have known the appellant for a long time. Finally, the judge noted that when the appellant was interviewed in October 2014, prior to removal, she claimed to be single. However, it was now her case that she was in a relationship with S2 until 2015.

21. In paragraphs [36] to [41], the judge gave her reasons for finding that the Secretary of State had not discharged the burden of proving that the appellant had used deception in order to obtain her TOEIC certificate.

The Application for Permission to Appeal to the Upper Tribunal

22. Mr Macdonald settled the appellant's application for permission to appeal to the Upper Tribunal.

23. Ground 1 was that the judge had made material errors at paragraphs [34] and [23]. The judge had been wrong to say that no one, apart from Ms A, had written a letter on the appellant's behalf or attended the hearing on her behalf to support her claims. A witness statement from Maria Santos, the mother of one of the women who was in a short-term relationship with the appellant, was sent to the court before the hearing. This made it very clear that the appellant and her daughter were in a lesbian relationship and that the relationship had ended when her daughter returned to Brazil to look after her paternal grandmother.

24. The judge was wrong to say at paragraph [23] that there was no witness statement from Ms A and no means of identification. Ms A had made a signed and dated witness statement giving her address. It had been sent to the Tribunal before the hearing, accompanied by a copy of her residence permit as a recognised refugee.

25. Both statements were material to the issue of whether the appellant was a lesbian and the A statement was also material to the issue of whether Ms A's evidence should be rejected by the judge in large part because of the absence of a witness statement. The failure to take these two statements into account meant there was not a proper or full consideration of all the available evidence.

26. Ground 3 was that the judge had erred in her Article 8 assessment at paragraph [45] because she had failed to deal with the effect on the appellant's Article 8 rights of her very clear and definite finding that the appellant had not committed any fraud or deception with regard to the English language test. This finding of fact meant that the sole reason for the refusal of her application for leave to remain under the Tier 4 General Student category, and the decision to remove her from the UK under Section 10, had disappeared. In the light of this finding of fact, the appellant fully met the requirements of the Immigration Rules for further leave. She was able to argue compliance with the law and the Immigration Rules as relevant issues on proportionality in her Article 8 claim: see **Mostafa (Article 8 and Entry Clearance) [2015] UKUT 112 (IAC)**.

The Rule 24 Response

27. Chris Avery of the Specialist Appeals Team settled the Rule 24 response on behalf of the Secretary of State opposing the appeal. With reference to ground 1, without sight of the statement the Secretary of State was unable to offer a view as to the materiality of any error. Furthermore it was unclear why the absence of the documents was not brought to the attention of the judge by the appellant's representative at the hearing. With respect to ground 3, the Secretary of State was of the view that this was not an error. The points raised could not have counted as positive factors in the proportionality assessment.

The Hearing in the Upper Tribunal

28. At the hearing before me to determine whether an error of law was made out on either or both permitted grounds, I explored with Mr Macdonald the point raised by Mr Avery in the Rule 24 response. Mr Macdonald said that he did not have the witness statements himself. He was only given the witness statements after the hearing. He had no idea why Maria Santos had not been asked to attend the hearing to give oral evidence.

29. I informed the representatives that in my file there was a supplementary bundle containing the two witness statements which bore a manuscript endorsement to the effect that the witness statements had been received after the hearing. (There was also reference made in the manuscript note to an E-det, which indicated that Judge Kamara had already sent her decision for electronic promulgation by the time the witness statements reached her.)

30. Mr Macdonald submitted that the fault lay with Taylor House administration, and there was procedural unfairness in consequence. Mrs Santos' evidence corroborated that of Ms Asif and the appellant. It could not be said that it was not material to the outcome of the assessment of the credibility of the core claim.

31. On behalf of the Secretary of State, Mr Tufan invoked **Ladd v Marshall** and submitted that in any event the witness statement of Mrs Santos was of little significance, as she was just giving hearsay evidence about what had been said by her daughter and she did not attend the hearing. Also, she had not exhibited to her statement any documents to show, for instance, that her daughter was in fact out of the country and so unable to be a witness herself.

32. On the topic of ground 3, Mr Tufan agreed the judge had erred in her assessment of the Article 8 claim in paragraph [45], but he submitted the error was not material as Article 8(1) was not engaged, following **Patel**. If the error was material, the finding on deception needed to be revisited, as the judge's reasoning was flawed. Mr Tufan produced a typed note of a decision by Upper Tribunal Judge Reeds given on 1 March 2016 in respect of the appellant's application for permission to seek judicial review of the Section 10 removal decision. According to the note, Upper Tribunal Reeds had refused to grant permission to the appellant to bring proceedings for judicial review, as her demonstrated ability to speak English was "not enough" to justify a challenge to the S10 removal decision.

Discussion

33. In **MM (Unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** a Presidential panel gave the following guidance:

1. Where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside.

2. A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered, with resulting unfairness (**E & R v Secretary of State for the Home Department [2004] EWCA Civ 49**).

34. The following passages in **MM** are particularly pertinent to the matters raised in oral argument:

> 19. Of unmistakable importance also, in the context of this appeal, is the decision of the Court of Appeal in E & R - v - Secretary of State for the Home Department [2004] EWCA Civ 49. As appears from the opening paragraph of the judgment of Carnwarth LJ, one of the two central issues raised in this appeal concerned cases decided by the first instance Tribunal (in that instance, the Adjudicator) where it is demonstrated that –
>
> > '... an important part of its reasoning was based on ignorance or mistake as to the facts ....'

Drawing particularly on the speech of Lord Slynn in R - v – Criminal Injuries Compensation Board, ex parte A [1999] 2 AC 330 (at pages 333 – 336), Carnwath LJ stated:

'[63] In our view, the CICB case points to the way to a separate ground of review, based on the principle of fairness ... the unfairness arose from the combination of five factors:

(i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

(ii) The fact was 'established,' in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

(iii) The Claimant could not fairly be held responsible for the error;

(iv) Although there was no duty on the Board itself, or the police, to do the Claimant's work of proving her case, all the participants had shared interest in co-operating to achieve the correct result.

(v) The mistaken impression played a material part in the reasoning.'

...

20. The principles relating to the impact upon proceedings of unfairness arising from error of fact were reconsidered by the Court of Appeal in R & ors (Iran) v SSHD in which decision the Court of Appeal conducted a detailed review of categories of error of law frequently encountered. Brooke LJ said the following:

'**Part 6.Error of law: unfairness resulting from a mistake of fact**

28. The next matter we must address relates to the circumstances in which an appellate body like the IAT, whose primary role during the relevant period was restricted to identifying and correcting errors of law, could entertain an argument to the effect that the outcome in the lower court was unfair as a result of a mistake of fact, and that this constituted an error of law which entitled it to interfere.

In E & R v Home Secretary of State [2004] EWCA Civ 49; [2004] QB 1044 this court was concerned to provide a principled explanation of the reasons why a court whose jurisdiction is limited to the correction of errors of law is occasionally able to intervene, when fairness demands it, when a minister or an inferior body or tribunal has taken a decision on the basis of a foundation of fact which was demonstrably wrong ...

30. At para 64 Carnwath LJ said that there was a common feature of all these cases, even where the procedure was adversarial, in that the Secretary of State or the particular statutory authority had a shared interest with both the particular appellant and with any tribunal or other decision-maker that might be involved in the case in ensuring that decisions were taken on the best information and on the correct factual basis. At para 66 he identified asylum law as representing a statutory context in which the parties shared an interest in co-operating to achieve a correct result. He went on to suggest that the ordinary requirements for a finding of unfairness which amounted to an error of law were that:

    (i) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;

    (ii) it must be possible to categorise the relevant fact or evidence as 'established' in the sense that it was uncontentious and objectively verifiable;

    (iii) the appellant (or his advisors) must not have been responsible for the mistake;

    (iv) the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning.'

Notably, the learned lord Justice made clear that he was not seeking to lay down a precise code.

...

32. The reference to the Ladd v Marshall principles is a reference to that part of the judgment of Denning LJ in [1954] 1 WLR 1489 when he said (at p 1491) that where there had been a trial or hearing on the merits, the decision of the judge could only be overturned by resort to further evidence if it could be shown that:

    (1) the new evidence could not with reasonable diligence have been obtained for use at the trial (or hearing);

    (2) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive);

    (3) the new evidence was apparently credible although it need not be incontrovertible.

33. By way of a final summary of the position, Carnwath LJ said in E and R at para 91 that an appeal on a question of law might now be made on the basis of unfairness resulting from 'misunderstanding or ignorance of an established and relevant fact' and that the admission of new evidence on

> such an appeal was subject to Ladd v Marshall principles, which might be departed from in exceptional circumstances where the interests of justice required.

35. I find that the judge made a mistake of fact at paragraph [23] in stating that there was no witness statement from Ms A. There was such a witness statement in existence, although it had not been deployed before her at the hearing. I find that the witness statement of Ms A did not reach the judge until after the hearing and until after she had made her decision based on the evidence deployed at the hearing.

36. The judge was similarly mistaken in paragraph [34] in stating that no other person had written a letter on the appellant's behalf apart from Ms. Mrs Santos signed a witness statement on 14 March 2016, which also did not reach the judge until after the hearing.

37. I accept that the appellant's solicitors intended that the witness statements should be adduced in evidence at the hearing, and sought to achieve that result by faxing them to Taylor House on 15 March 2016, two days before the hearing took place. However, as the solicitors would have been well aware, they were serving the evidence late and not in accordance with the timetable stipulated in the standard directions. It was thus reasonably foreseeable that the witness statements might not make their way into the judge's possession before the hearing. This would not have mattered, if the solicitors had ensured that Counsel had copies of the witness statements so that he could deploy them at the hearing.

38. I find that the responsibility for the resulting mistakes in the decision lies with the appellant's legal representatives. But for the unexplained failure by the solicitors to provide Counsel with copies of these witness statements, particularly the witness statement from Ms Asif whom they knew Counsel was going to be calling as a witness, the mistakes in the judge's decision would not have arisen.

39. I am also not persuaded that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different if the judge had taken account of the two witness statements when writing up her decision. The content of Ms A's witness statement is not materially different from the contents of her letter, which presumably she adopted as her evidence-in-chief. The only significant point of difference relied on by way of appeal to the Upper Tribunal is that the witness statement contains Ms A's address. Nonetheless, the point made by the judge at paragraph [23] still holds good. As a result of the late service (and even later receipt) of the witness statement containing her address, the respondent remained at a disadvantage in that there was no time to make enquiries about Ms A.

40. I accept that the witness statement of Mrs Santos was helpful to the appellant's case in that she gave evidence of her daughter Bruna telling her that she had had some casual sex with the appellant. However, the judge was bound to attach little weight to the witness statement for a

number of reasons. Firstly, this was because the maker of the statement was in the jurisdiction (living in London) and the judge had not been given any reason as to why the witness had not been able to attend the hearing to give oral evidence, and to be tested on her oral evidence in cross-examination. Secondly, the evidence was hearsay in that Mrs Santos did not claim to have witnessed any overt signs of her daughter and the appellant being in a lesbian relationship, apart from them being together "all day long" in a room in the house which they all shared. Despite being suspicious of the relationship between them on this account, Mrs Santos was nonetheless surprised when her daughter informed her that they were in a lesbian relationship. Thirdly, as submitted by Mr Tufan, there were no primary documents exhibited to the witness statement which supported the claimed departure of the daughter to Brazil; or supported a prior association between the daughter and the appellant (such as documentary evidence of residence at the same address at the same time). Fourthly, as the witness statement of Mrs Santos had not been deployed at the hearing, the judge had not heard any submissions from the Home Office Presenting Officer about it, and more importantly the Home Office Presenting Officer had been deprived of the opportunity to cross-examine the appellant on its contents.

41. In conclusion, the witness statement of Mrs Santos was not a reliable piece of evidence that might change the landscape. There is not a real possibility that its contents, taken in conjunction with the other evidence bearing on the issue, would have persuaded the judge to the lower standard of proof that the appellant was a lesbian.

42. Accordingly, I find that ground 1 is not made out as with reasonable diligence on the part of the appellant's legal representatives the two witness statements could have been deployed at the hearing, and thus they are responsible for the judge commenting on their absence; and in any event there is not a real possibility that the outcome would have been different if the judge had been aware of their existence, and had taken their contents into account when making her decision.

43. I am however persuaded that ground 3 is made out for the reasons given by Mr MacDonald in the permission application. Having found that the appellant did not use deception in order to obtain a TOEIC certificate, and she was thus, by necessary implication, unjustly facing removal to Pakistan on an allegation of fraud that had been shown to be false, the judge needed to explain why it was nonetheless proportionate to require the appellant to return to Pakistan.

Appropriate Forum for Re-Making the Decision under Article 8 ECHR

44. In the ordinary course of events, the appropriate course would be for the Upper Tribunal to re-make the decision under Article 8 ECHR, with or without hearing further evidence. But neither Mr Macdonald nor Mr Tufan wanted me to proceed to re-make the decision on the evidence as it stands. Mr Macdonald did not want me to do so, as he wished to adduce

additional evidence that was not before the First-tier Tribunal on the topic of the course of study that the appellant would have wished to pursue had not her leave to remain application been unjustly refused. Mr Tufan did not wish me to do so either, because he did not accept the soundness of the factual premise on which the Article 8 claim was now being squarely put and he wished to introduce expert evidence, which has now become available, to fortify the evidence previously relied on by the Secretary of State.

45. I consider that the judge's reasoning on the issue of deception is erroneous in law such that her finding is unsafe. Although she refers to **Ghazi v SSHD (ETS - Judicial Review) IJR [2015] UKUT 00327 (IAC)** she misdirects herself as to its import. While the Presidential panel in **Ghazi** identified shortcomings in the generic evidence, the panel's overall conclusion was that the generic evidence was of sufficient robustness and reliability to be capable of discharging the burden of proof.

46. The judge was thus wrong to state at paragraph [38] that there was no evidence to show that the reason for the test result being invalidated was as a result of fraud or dishonesty; and she was also wrong to say at paragraph [40] that there was no evidence of the appellant having obtained a fraudulent test result.

47. Accordingly, given the extent of the judicial fact-finding which will be required, I consider that the appropriate forum for the re-making of the decision under Article 8 ECHR is the First-tier Tribunal.

Notice of Decision

48. The decision of the First-tier Tribunal dismissing the appellant's appeal on asylum, humanitarian protection and human rights (Article 3 ECHR) grounds did not contain an error of law, and that part of the decision stands.

49. The decision of the First-tier Tribunal dismissing the appeal on human rights (Article 8 ECHR) grounds contained an error of law, and accordingly that part of the decision is set aside.

Directions

50. The appellant's appeal on human rights (Article 8 ECHR) grounds is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge apart from Judge Kamara.

51. The finding on the allegation of deception shall not be preserved.

52. Accordingly, the time estimate for the rehearing is 2 hours.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 7 June 16

Deputy Upper Tribunal Judge Monson