Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04272/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11 April 2017	**On 14 June 2017**

Before

THE HONOURABLE MR JUSTICE COLLINS
UPPER TRIBUNAL JUDGE TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, a Senior Home Office Presenting Officer of the Specialist Appeals Team
For the Respondent: Mrs H Gore of Counsel, instructed by Montas Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Judge Fowell given on 30 August 2016 whereby he allowed the present respondent's appeal against a decision of the Secretary of State that she should not be permitted to remain in this country. The respondent is now some 48 years old, having been born in August 1968 in Uganda. She came to this country first on 7 March 2008, having entry clearance as a visitor. That entry was one which covered six months and expired at the

beginning of August 2008 but she did not return to Uganda nor did she take any steps to obtain further leave. Accordingly, she simply remained unlawfully until December 2011 when an application was submitted relying on Articles 3 and 8. That was refused in July 2012 and she was offered the opportunity in June 2013 to claim asylum but for good reason she refused that. She was given a right of appeal in June 2013 and that appeal was dismissed in January 2014 when her appeal rights were exhausted. She made further representations in March 2014 and those were rejected in July. The decision giving formal reasons for the refusal to allow her to remain was given on 12 June 2015 and it was against that decision that the appeal was brought.

2. The respondent suffered a very unfortunate experience in Uganda. In 2007 it seems her husband was killed and she was then raped by, among others, her brother-in-law. This led to a serious effect upon her health as might be no surprise, and it was as a result of that and the absence of any real assistance that she said was available to her in Uganda that she decided to come to this country. Unfortunately she simply came as a visitor and then overstayed and she has taken, or tried to take steps notwithstanding that to remain of which this is the latest.

3. Unfortunately, the Home Office was thoroughly incompetent in that there was a failure to put before the First-tier Judge any material, in particular the previous decision of the judge in 2014 which had resulted in the refusal of her appeal at that date. The First-tier Judge was aware of the existence of that appeal because it is referred to in the refusal letter which was the subject of the appeal, and he thus recognised that the judge then had taken the view that there were no sufficient obstacles to her removal to Uganda at that stage. What was particularly relied on, and what changed the matter so far as Judge Fowell was concerned, was the medical evidence which was such as, in his view, had changed the situation.

4. Now sadly, quite apart from the effect of rape and the attack and the loss of her husband, as a result the respondent suffers from HIV and is undergoing treatment for that condition. In addition, there was a psychological report which made clear that she was suffering from PTSD and major depression and was receiving individual trauma focused cognitive behavioural therapy but her mental health problems were likely to deteriorate, and seriously deteriorate if she was returned and there was, in the view of the psychologist, a risk of suicide. There is available treatment in Uganda, albeit it may well be that it is not as satisfactory as that available here and of course there is the real concern that if she is returned to Uganda that will seriously affect her mental condition. Furthermore, as far as HIV is concerned there is again treatment available there, albeit it may well be that free treatment is not so generally available as here. There is, because of the approach to homosexual relations in Uganda, a feeling that those suffering from HIV are not to be pitied but what is important in this case is that her HIV has resulted not

from any homosexual relationship but from the rape by soldiers including, as I say, her brother-in-law. She has asserted, and the evidence before Judge Fowell in the absence of any initial material which was referred to in the previous judgment in 2014 was that she had no family and friends left there, albeit there is reference in the decision letter to the fact that there is a branch of the church which she is attending and which she is finding to be something she values and that sort of support can be maintained. It is said again in the decision letter that there was a friend whom she named who would be able to assist on her return and there would be support available.

5. Judge Fowell in his decision dealt with the Article 3 claim in relation to the medical condition and having referred to the relevant authority **GS (India) and Others v the Secretary of State [2015] EWCA Civ 40** which made it clear that it would only be in a rare case that returning someone to a country with a lower standard of medical treatment could be said to expose them to a breach of Article 3 of the European Convention on Human Rights, and in paragraph 44 Judge Fowell said this:

> "Although I take into account her mental health problems and her subjective fear of harm on return they are secondary aspects of the matter and cannot fundamentally alter the position. It has not been suggested that mental health facilities cannot be accessed in Uganda and the claim to be an actual risk of a repetition of a violent or sexual assault has already been the subject of the previous appeal. There is no basis for me to disturb that conclusion. The appellant's fear of return however genuine prevent her return on Article 3 grounds".

I think there is a misprint in that last sentence but what effectively he is deciding is that she cannot rely on her medical situation to support an Article 3 claim.

6. He then turned to Article 8. In paragraph 46 he said this:

> "46. There are clearly a number of immediate obstacles over and above registering for HIV treatment. She has her depression and PTSD to contend with exacerbated by her fear of harm. She has no immediate source of funds and would have to obtain employment. This is difficult at her age and without any formal education. She also has on the evidence available no relatives there who can take her in or crucially any means of obtaining accommodation.
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> 47. This is a formidable list of the major features and lack of any practical support. If there were some accommodation and relative or friend to assist with obtaining the medical help she needs the situation would present a very different appearance but that is not the case. I bear in mind too the circumstances in which the appellant left Uganda in the wake of an ordeal which left her homeless and traumatised without any means of support".

7. However, as he recognised, many of those features to which he referred had already been considered in previous applications and there was no suggestion that the appellant's evidence that she had been attacked and raped had been challenged and therefore as he recognised it must follow that there were no very significant obstacles to her return. That meant, as again he properly decided, that it was only if there was fresh material which was not available to and was not considered by the previous judge that he could find in her favour and what he relied on was the medical evidence to which we have already referred.

8. He also properly cited the relevant parts of the decision of Lady Hale in **R (on the application of Razgar) v the Secretary of State [2004] UKHL 27** where she said that although the possibility could not be excluded it was not easy to think of a foreign healthcare case which could fail under Article 3 but succeed under Article 8, and she went on to say that only the most compelling humanitarian considerations were likely to prevail over the legitimate aims of immigration control or public safety. Lord Justice Laws in **GS India** referred to the same, saying in paragraph 86 of that case:

> "If the Article 3 claim fails (as I would hold it does here), Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm and capacity to form and enjoy relationships or a state of affairs having some affinity with the paradigm".

9. He also cited similar observations in **MM Zimbabwe [2012] EWCA Civ 279**. Mrs Gore has particularly relied on what he says in paragraph 53 which is as follows:

> "I also note that the appellant has been living with her friend Helen in the UK for almost all of her stay here. This has proved to be a very durable relationship and one which has provided the appellant with huge practical and no doubt personal support. Her depression is of a serious nature involving suicidal thoughts and would significantly affect her ability to integrate at all even if the bare requirements of food and shelter can be achieved and it does not appear likely that they can be. A fear of harm would also have a seriously limiting effect"

and he concluded in the circumstances that the personal life and circumstances were such as took the matter beyond purely medical factors. On the other hand, it was his view that the new medical information provided the significant change or the additional factor to be weighed in the balance which had been referred to in the authorities in relation to Article 3 and Article 8 on medical situations. What is submitted essentially by Mr Melvin is that what the judge has done is to misuse the medical evidence in the sense that, having rejected the medical evidence as a proper ground for saying that removal should not take place, he has then used it to support the Article 8 claim and thus he has effectively overtaken the decision that it cannot succeed on its own.

10. That his was a compassionate decision there is no doubt. On the other hand we have to look at the respondent's immigration history, the fact that she has remained here unlawfully and the fact that harsh though it be, the medical evidence was insufficient to justify a decision that it would be a breach of her human rights were she to be returned to Uganda. True, that as a result of what she suffered she has serious mental problems but there is no doubt that there is, as the judge found, treatment available in Uganda. Equally, again as the judge recognised, there was the previous decision at which there can be no doubt that her mental condition, as Dr Green refers to her having seen him since 2011 and in relation to the HIV, was all available. It is of course most unfortunate that the Home Office failed to put all the material evidence before Judge Fowell and for reasons that we have already indicated because it was served far too late, we have not thought it right to admit it. But it is not in our view essential because as we say, it is clear that medical evidence was taken into account, and albeit it maybe that her condition has deteriorated since the previous decision, nevertheless we regret to say that in our view the judge did indeed not use the medical evidence correctly because essentially it is the medical evidence which in his view tipped the balance in Article 8 terms but that fails to get over in the circumstances of this case the decisions, harsh as we say though they be, which govern the correct approach where it is necessary to take into account the legitimate aims of immigration control and that is the position so far as this case is concerned.

11. We should emphasise that this decision is one which depends entirely upon the facts of this case and cannot be taken as any general consideration in cases involving medical grounds for saying there should be leave to remain in this country. All these cases will inevitably depend upon their own facts and with some regret we are bound to say we feel that it is necessary to allow this appeal and we do not think that there is anything to be said for a remittal.

12. In all the circumstances our decision is that the appeal of the respondent, as she now is, should be dismissed.

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 him 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 2017

Mr Justice Collins