Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01700/2017**

THE IMMIGRATION ACTS

Heard at Manchester
On 1 May 2018

Decision & Reasons Promulgated
On 14 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ANGEL [U]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Nicholson (counsel) instructed by WTB Solicitors LLP
For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Agnew promulgated on 14 September 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on [ ] 1986 and is a national of Rwanda. On 1 February 2017 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Agnew ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 16 November 2017 First-tier Tribunal Judge Pullig gave permission to appeal stating

> "1. The appellant, a national of Rwanda, seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Agnew, decided on the papers and promulgated on 14 September 2017, dismissing the appellant's appeal against the Secretary of State's decision refusing her protection claim. The appellant was unable to give evidence as she was medically unfit to conduct proceedings and litigation friend had been appointed.
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> 2. The grounds seeking permission complain first about the Judge's treatment of the medical evidence regarding the appellant's medical condition and the psychiatric report in evidence. They note that [29] contains the comments that the Judge had said "*either that* [her mental health has deteriorated - as found by the psychiatrist] *or she was, following the refusal of her claim for asylum on 01 February 2017, pretending to have serious mental health issues to support her claim …"* (emphasis in the grounds). The Judge observed that the psychiatrist had not seen her medical notes or other evidence. However, say the grounds an independent psychiatric report was requested by the Tribunal and the Judge's comment was outside her expertise. From reading the Judge's decision and the psychiatric report, it is clear that the appellant was suffering from the mental health condition demonstrated. It is not clear what, if any, findings the Judge made in this respect or how it affected her decision for a vulnerable adult, notwithstanding this appeal was decided on the papers. This discloses an arguable error of law as amplified in the grounds.
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> 3. The grounds also complain about the Judge's finding that the appellant is not a lesbian. After much consideration of the evidence that conclusion is found at [63]. I find that the reasons are unclear because, leading up to that, I find that there are clear and sustainable adverse credibility findings about article written in which the appellant's name had been inserted on the one hand and the evidence regarding her sexual orientation from other confirming that orientation. That should have led the Judge to consider HJ (Iran) v SSHD [2010] UKSC 31. I find this is also arguable.

> 4. Thus, I find there are arguable material errors of law and I grant permission."

The Hearing

5. (a) For the appellant, Mr Nicholson moved the grounds of appeal. He told me that there are two grounds of appeal. The first is that the Judge strays into the role mental health professional at [9] of the decision and does not treat the medical evidence correctly. The second relates to the way the Judge dealt with evidence about the appellant's sexuality.

(b) Mr Nicholson focused on [29] of the decision. He reminded me that this case was determined on documentary evidence alone. He took me through [20] to [29] of the decision, referring me to the Judge's various expressions of surprise throughout those paragraphs, before dwelling on the Judge's comments at [29]. He told me that at [29] the Judge was wrong to look for evidence relating to mental health within the letters of support from the appellant's church & from the LGBTI community. He told me that it was wrong to look for evidence relating to the appellant's mental health in the report prepared by Karen Smith from Lesbian Immigration Support in Manchester. He told me that the fundamental flaw is in the sixth sentence of [29] where the Judge says

> "Either that or she was, following the refusal of her claim for asylum on 1 February 2017, pretending to have serious mental health issues in order to support a claim for asylum …"

(c) Mr Nicholson addressed the Judge's treatment of the evidence of the appellant's sexuality. He relied on the respondent's policy for identifying sexual issues in an asylum claim. He took me to various passages of the appellant's asylum interview record and told me that the Judge failed to consider the appellant's evidence contained in her asylum interview, and failed to analyse the report from Karen Smith, together with the witness statements and letters of support contained in the appellant's bundle.

(d) He told me that the decision is inadequately reasoned and does not contain an analysis of crucial evidence. He urged me to set the decision aside and to remit this case to the First-tier to be determined of new.

6. (a) For the respondent Ms Petterson took me to [32] of the decision and told me that the Judge took account of background information. She told me that the Judge effectively found that, even if the appellant is a lesbian, her claim cannot succeed because it is not supported by background information. The Judge was entitled to conclude that lesbians are not persecuted in Rwanda.

(b) When Ms Petterson turned her attention to [29], she conceded that what the Judge says in the sixth sentence (there) undermines the decision. She told me that what the Judge says is unfair, and indicates that the Judge may have approached the evidence with a closed mind.

She told me that she accepts that this case needs to be remitted so that a new fact-finding exercise can be carried out.

Analysis

7. This case has a slightly unusual procedural history. There was medical and psychiatric evidence indicating that the appellant would struggle to give evidence. Even though other witnesses were available, no oral evidence was led, and the case was determined on the documentary evidence.

8. The appellant's bundle contains a witness statement from the appellant, a supporting witness statement and four letters of support. In addition, a detailed letter from Karen Smith, of Lesbian Immigration Support, Manchester, was placed before the Tribunal. The respondent's bundle contained the appellant's asylum interview and a transcript of the appellant's screening interview.

9. At [22] and [23] the Judge considers the letter from Ms Smith. Between [23] and [28} the Judge considers the letter from the appellant's GP and the psychiatric report dated 23 July 2017. The error that the Judge makes is at [29] where the Judge examines the letter from the appellant's church and the four letters of support for evidence of mental illness. Neither the appellant's church, nor Ms Smith, nor the appellant's supporting witnesses can offer psychiatric evidence. The Judge compounds that error by using a poor choice of words creating the impression that the Judge dismisses the medical evidence and concludes that the appellant is dishonest - before considering the remaining strands of the appellant's evidence.

10. I do not doubt that the Judge's intention was to take an holistic approach to all of the evidence in the case, but the choice of words at [29] creates the impression that the Judge closed her mind before approaching the appellant's witness statement, the asylum interview record and the other strands of evidence.

11. Parties now agreed that [29] contains a material error of law. The choice of words at [29] creates the impression that, after considering the psychiatric evidence, the Judge's mind is made up. The choice of words at [29] creates the impression that the Judge approaches the rest of the evidence in this case on the basis of the appellant has deliberately duped the psychiatrist, so that her overall credibility is undermined. It is not clear from the decision how the Judge reached the potential conclusion that the appellant has been dishonest with the author of the psychiatric report. It is not clear from the decision why the Judge rejects the conclusions of the psychiatrist.

12. There is also a separation between the Judge's consideration of the psychiatric evidence and the Judge's analysis of the appellant's witness statement & the record of asylum interview. In M (DRC) [2003] UKIAT 00054 the Tribunal said that it was wrong to make adverse findings of

credibility first and then dismiss the report. Similarly, in Ex parte Virjon B [2002] EWHC 1469, Forbes J found that an Adjudicator had been wrong to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself. That too was the view of the Court of Appeal in the case of Mibanga [2005] EWCA Civ 367 and in Ladji Diaby v SSHD [2005] EWCA Civ 651. In HE (2004) UKIAT 00321 the Tribunal said that "*where the report is specifically relied on as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility, rather than just as an add on, which does not undermine the conclusions to which he would otherwise come".*

13. This case is slightly different because the Judge appears to have considered, and rejected, the psychiatric evidence before considering the appellant's evidence, but the principle remains the same. The Judge was wrong to reach a conclusion based on one strand of evidence before considering all of the evidence cumulatively. In S v SSHD 2006 EWCA Civ 1153 the Court of Appeal said that an error of law only arose where there was artificial separation amounting to a structural failing, and not where there was a mere error of appreciation of the medical evidence (Mibanga distinguished).

14. What is contained at [29] amounts to a material error of law which creates a fundamental flaw in the Judge's overall reasoning.

15. As the decision is tainted by a material error of law, I set it aside. I am asked to remit this case to the First -tier. I consider whether or not I can substitute my own decision, but find that I cannot do so because of the extent of the fact-finding exercise necessary.

Remittal to First-Tier Tribunal

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

17. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

18. I remit this case to the First-tier Tribunal sitting at Manchester to be heard before any First-tier Judge other than Judge Agnew.

Decision

The decision of the First-tier Tribunal is tainted by material errors of law.

I set aside the Judge's decision promulgated on 14 September 2017. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 2 May 2018

Deputy Upper Tribunal Judge Doyle