Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08615/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 22 January 2019	**On 08 February 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FUTILA [M]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Worthington of Parker Rhodes Hickmotts Solicitors
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge O'Hanlon who on 23 January 2018 dismissed the appellant's appeal on all grounds.

Background

2. The appellant, a citizen of the Democratic Republic of Congo (DRC) born on 28 January 1995, entered the United Kingdom on 24 February 2017 and applied for asylum the same day. The Judge having considered the evidence sets out findings of fact from [41]. The Judge notes there is little documentary evidence other than a copy of a UDPS membership card for the appellant. No original card has been produced despite the Judge noting at [45] the appellant indicated in her asylum interview that she could obtain the original membership card. On 22 May 2017 the appellant's solicitors forwarded an original identity card showing the appellant was of the UDPS although this was not the original membership card, the Judge noting a translation of the card referred to the appellant's address in Rotherham in South Yorkshire and was clearly issued after the appellant had arrived in the United Kingdom.
3. The Judge considers the provisions of paragraph 399L of the Immigration Rules. At [50] the Judge concludes there was no evidence to suggest the appellant had taken any form of office in the UDPS and that although the appellant's answers and interviews indicated some knowledge of this group, and that there was a reasonable degree of likelihood that the appellant was a member of the UDPS, it was not found there was any evidence to show the appellant was a leader or officer of that organisation.
4. The appellant claimed to have been arrested in the DRC five times between 2011 and 2016. The Judge finds an element of inconsistency in the appellants evidence across the screening interview, asylum interview and her oral evidence, referred to between [51 – 53]. The Judge at [54] found the appellant's escape from prison lacked credibility and did not find it to be true even to the lower standard of proof. Other issues causing the Judge to have doubts as to the appellant's credibility are referred to from [55]. The Judge considered the medical evidence provided to support the appellant's case, dated 22 January 2018, which the Judge found to be an even-handed report which found some of the appellant's injuries consistent with her account [58]. The Judge draws together the threads of the assessment between [59 – 62] in the following terms:

> 59. Having considered all the evidence in the round, I do not find there is a reasonable likelihood of the Appellant's account being true. Although I accept the Appellant may have been a member of the UDPS I find that as a result of the vagueness of the Appellant's account, the inconsistencies in her evidence which I have pointed out outweigh any factors including the Medical Report which supports the Appellant's account and I do not find that there is a reasonable likelihood that the Appellant's account is credible. In the light of that finding, I do not find that the Appellant has a genuine subjective fear on return to the DRC.

60. Although I have found the Appellant may have been a member of UDPS on the basis of the case ***AB and DM (Risk Categories Review) DRC CG [2005] UKAIT*** I find that mere membership of the UDPS would not bring the Appellant to the attention of the authorities. As previously indicated, I do not find that the Appellant was a leader of the UDPS and in accordance with the case of ***BM and Others DRC CG [2015]*** which found that, as a general rule, mere rank-and-file members are unlikely to be at real risk of persecution for a Convention reason and I find that the Appellant falls into this category.

61. Mr Worthington did not address me on Article 8 ECHR issues but for the sake of completeness, I find that there has been no evidence put before me that the Appellant has a partner or child and therefore does not satisfy the requirements for leave to remain under Article 8 on the basis of family life, Mr Worthington did not address me on paragraph 276ADE of the Immigration Rules and I find that the Appellant cannot show that she meets any of the criteria set out therein, nor did Mr Worthington try to persuade me that there were any compelling circumstances which might warrant consideration outside the Rules under Article 8 of the ECHR. In all of the circumstances, I find that the Appellant has not shown the Respondent that she qualifies for leave to remain on any private or family life grounds.

62. Similarly, although the Medical Report referred to suggest that the Appellant has the medical conditions referred to therein, Mr Worthington did not address me on any medical issues and I find that the Appellant does not suffer from sufficiently serious medical conditions in accordance with **N v SSHD 2005 AC 291** to satisfy the requirements for leave to remain under the ECHR.

5. The Judge finds at [63] that the appellant had not discharged the burden of proof upon her to show she has a well-founded fear of persecution for a Convention Reason, at [64] that the appellant had not established an entitlement to a grant of Humanitarian Protection, and at [65] that the appellant cannot succeed on human rights grounds.

6. Permission to appeal was initially refused by another judge of the First-Tier Tribunal but granted on a renewed application by the Upper Tribunal in the following terms:

> 1. Although the detailed decision of the First-Tier Tribunal has been carefully drafted in many respects, it is arguable that the First-Tier Tribunal failed to make any clear assessment of the claim that the appellant is a vulnerable witness and suffers from a combination of depression, PTSD, the effects of childhood and detention related sexual abuse and a tendency to somatise, as set out in the medical foundation report.
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> 2. The First-Tier Tribunal appears to have accepted the report as cogent at [58] but has arguably not approached the appellant's evidence with this evidence in mind and has

arguably failed to apply the relevant guidance on vulnerable appellants.

Error of law

7. I accept the term 'Mental disability' is taken to encompass mental ill health. The degree of disability in each individual's case will vary enormously and only in a small number of cases will it mean there is lack of mental capacity. It was not suggested before the Judge that the appellant lacked capacity to take an active part in the appeal process, which she did.
8. There are a range of mental health conditions, e.g. depression / anxiety, post-traumatic stress syndrome, obsessive compulsive disorder, personality disorders, eating disorders, schizophrenia, bipolar disorder, some of which are noted to affect the appellant in the medical report considered by the Judge.
9. It is accepted that difficulties may arise at a hearing for those with mental health disability, which may include communication difficulties, difficulty absorbing information; understanding what is being asked; providing focused answers; explaining, difficulty focusing; limited concentration span, and in certain cases, auditory / visual hallucinations. It is not recorded by the Judge or part of the grounds that the Judges attention was drawn to any of these issues, such as to deny the appellant a fair hearing.
10. If issues arise a court or tribunal is expected to consider the need for reasonable adjustments. The 'Child, Vulnerable Adult and Sensitive Witnesses Practice Direction' applicable to the First Tier and Upper Tribunal says that a vulnerable witness will only be required to attend as a witness and give evidence at a hearing, where the tribunal determines that the evidence is necessary to enable the fair hearing of the case, and that their welfare would not be prejudiced by doing so. In deciding this, the tribunal should have regard to all the available evidence and the representations of the parties. There is no indication of representations being made to the Judge that the appellant was unfit to give oral evidence and no indication in the Judges summary of such evidence at [21-34] that any adverse issues arose.
11. Mr Worthington confirmed that no submissions were made during the hearing or at the Case Management Reviews which preceded the hearing before the Judge of any reasonable adjustment that were required to enable the appellant to give her evidence and partake in the proceedings.
12. In relation to the question of whether the Judge took into account the appellant's presentation when assessing the weight to be given to the appellants evidence from all sources, it is not made out the Judge did not consider all the available material. At [48] the Judge specifically finds "*Paragraph 399L (iii) requires me to consider the coherence and plausibility of the Appellant's account. Coherence and plausibility of an account is at the heart of the assessment of the Appellant's*

credibility. In doing so, I need to examine all the evidence in the round including the evidence of the Medical Report of Dr Jillian Creasey of The Medical Foundation dated 2 January 2018." The Judge at [53] writes *"Throughout her evidence there have been other examples of errors in dates being made by the Appellant. For example, the Appellants evidence at the Hearing was that she was arrested on 28 November 2016 whereas in her asylum interview she had stated that she was arrested on 19 December 2016. Mr Worthington re-examined the Appellant on this point and initially the Appellant has confirmed that the date of 28 November 2016 was definitely correct. Considering the position further, the Appellant then changed her response and confirmed that the last arrested had been on 19 December 2016. I appreciate that the Appellant was giving evidence in what must have been, to her, stressful conditions and that she may therefore have become confused with dates but her evidence on re-examination that her arrested on 28th November was in 2011 not 2016 was an inconsistency which casts doubt upon the credibility of her account overall".* The Judge records at [34] that the appellant had stated that the date of 28 November 2016 for her final arrest was correct but that she change the response stating that the last arrest was on 19 December 2016 and that the arrest which took place on 28th November was in 2011 not 2016. The Judge was clearly aware of the pressures upon the appellant which are similar those to facing many who come before the First Tribunal on appeal. It is not made out the Judge, having considered the Medical Report and with the extensive training judges are given in relation to the Presidential Guidance on Vulnerable Witnesses, then proceeded to fail to take it into account when assessing the weight that could be given to the appellants evidence.

13. A further difficulty for the appellant in relation to the assertion that this matter should have meant a different decision being made is that the Judge notes from [55] that it was not only the evidence of the appellant but also from other witnesses which caused the Judge to doubt the credibility of the appellant's account. It is not made out that the problems arising from that other sources are in any way affected by the issues recorded as being relevant to the appellant in the medical evidence.

14. It is also not made out that there was any degree of artificial separation in the Judge assessing the weight that could be given to the appellants evidence. This is not a case in which the Judge found the appellant lacked credibility and then use this to attach little or no weight to the medical evidence. The evidence was clearly considered in the round and it is not legal error if, having considered the evidence, the Judge failed mention each and every aspect in the determination. As noted in the grant of permission this is a carefully written decision. I do not accept Mr Worthington has made out his argument that the Judge failed to "grapple with the medical evidence". Mr Worthington accepted there are inconsistencies as outlined by the Judge and that the issue was the explanation for such

inconsistencies. I do not find it made out that the explanation relied upon by the appellant is sufficient to establish arguable legal error in that found by the Judge.

15. In relation to the second ground, alleged flawed approach to the witness evidence, I find no arguable legal error is made out. The Judge had the benefit of both seeing and hearing the witnesses give their evidence. The appellant may find that it was unsatisfactory that the Judge found that little weight could be attached to the evidence of Mr Kengela but that is not the determinative factor. The assertion that the witnesses evidence had to be accepted or rejected is arguably incorrect as the Judge was entitled to assess the degree of weight that should be attached to any evidence. The Judge may find that little or substantial weight should be attached and then to assess that against the weight given to the other evidence to establish whether the required burden of proof has been discharged. The Judge clearly considered the evidence and, as noted above, has given ample reasons in support of the findings made. The weight to be given to the evidence was a matter for the Judge.

16. I do not find it made out the Judge has erred in law in a manner material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

17. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson Date: 23 January 2019