IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos:
UI-2023-005272; UI-2023-005273
FTT No: PA/00813/2022;
PA/00814/2022

UI-2023-005274; UI-2023-005275
FTT No: PA/00815/2022;
PA/00816/2022

UI-2023-005276; UI-2023-005277
FTT No: PA/00817/2022;
PA/00818/2022

UI-2023-005278; UI-2023-005279
FTT No: PA/00822/2022;
PA/00839/2022

UI-2023-005280; UI-2023-005281
FTT No: PA/00840/2022;
PA/00841/2022

UI-2023-005282; FTT No:
PA/00953/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3rd June 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

YG and others
(anonymity order made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Wood, Immigration Advisory Service

For the Respondent: Ms Young, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellants are each granted anonymity.

No-one shall publish or reveal any information likely to lead members of the public to identify the Appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The eleven Appellants in these linked appeals are all nationals of Honduras, who seek protection in the United Kingdom on the grounds that they have a well-founded fear of persecution/serious harm at the hands of the gang Mara 18.

2. The Appellants are all members of the same extended family. All of the Appellants formerly lived in Choloma, a town in Hondurus where, it is accepted, there is a major problem with extreme gang-related violence. They advance inter-related claims of violence, threats, intimidation and extortion.

3. The Respondent refused each claim and the Appellants appealed to the First-tier Tribunal. There the linked appeals came before First-tier Tribunal Judges Frantzis and Hollings-Tennant, sitting as a panel. The hearing took two days, with six of the adult appellants giving live evidence. At the conclusion of the hearing the panel determined that there were a number of significant inconsistencies in the evidence which cast doubt on the credibility of the Appellants' assertions, and the extent to which the documentary evidence adduced can be relied upon. That being the case it found the burden of proof was not discharged and the appeals were dismissed.

Error of Law

4. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Sheridan on the 10th January 2024, and on the 21st March 2024 the matter came before me.

5. Although Judge Sheridan had observed that some of the grounds were stronger than others, he did not restrict the grounds to be argued. As it happens I was not required to address all of the Appellants' complaints, because before me the Secretary of State accepted that the First-tier Tribunal decision must be set aside for procedural unfairness and a failure to apply the Joint Presidential Guidance Note No 2 of 2010: *Child, vulnerable adult and sensitive appellant guidance* ('the guidance note').

6. The guidance note does not feature in the decision of the First-tier Tribunal. It does not appear to have been brought to the Tribunal's attention at a CMR, as the guidance suggests. Nor was it referred to by Counsel. The difficulty with that, the

parties now agree, is that there was evidence, buried in the voluminous bundles, to the effect that one of the lead appellants, IG, has been diagnosed with bipolar disorder. It is further accepted that this is the type of illness which might well lead a Tribunal to treat someone as a vulnerable witness. Where a vulnerability like that is not taken into account by the Tribunal in accordance with the guidance note, it will most likely amount to an error of law: AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123. The panel, having heard IG's evidence, found it to be "vague", "evasive" and "inconsistent". It is not possible to say whether that would have remained its conclusion had it been treating her as a vulnerable witness. Obviously, had her evidence been accepted, this may well have led to a different outcome for the Appellants overall. It was on this basis that Ms Young accepted this ground to be made out.

7. I accept the concession of the Secretary of State on this ground with some reluctance. This was a factually complex case in which the Tribunal heard evidence and submissions over 2 full days and produced a lengthy and detailed decision. It is astonishing to me that nobody in the Appellants' then legal team (now changed) thought to draw IGs condition to its attention. The omission was not of the Tribunal's making. That omission has nevertheless, it is accepted, led to a material unfairness.

8. In MM (Unfairness; E & R) Sudan [2014] UKUT 105 (IAC) a Tribunal had dismissed the appeal of a Coptic Christian from Sudan on the basis of inconsistencies arising from her asylum interview record. It turns out that her solicitors had, after her interview and before the decision to refuse protection, written to the Home Office amending the record of the interview in several material respects. That letter had not been produced by either side, and so the Tribunal had been unaware that MM had, at an early stage, said that the record was inaccurate. On appeal the Upper Tribunal (Mr Justice McCloskey and Upper Tribunal Judge Southern) reviewed the authorities on procedural unfairness and considered, *inter alia*, the decision in E&R v Secretary of State for the Home Department [2004] EWCA Civ 49 where Lord Justice Carnwath had in turn drawn upon the decision of Lord Slynn in R v Criminal Injuries Compensation Board ex part A [1999] 1 AC 330. Carnwath LJ found the CICB case to identify circumstances in which unfairness will arise even in the absence of any error on the part of the tribunal:

> "[66] In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the Appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

9. This leads the Upper Tribunal in MM to the following conclusion:

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

10. In setting the decision of the Tribunal in this case aside, I make it clear that I do so on this basis.

11. It follows that I need not address the remaining grounds, although it is worth noting that one other ground also turns on an *MM (Sudan)* error. The Tribunal had before it two police reports, said to emanate from the police in the Appellants' home town. These had in particular been relied upon by YG and her family. At its paragraph 51 the Tribunal said this:

> YG has also provided what are said to be police reports dated 24th April 2017 and 2nd August 2018. In accordance with Tanveer Ahmed [2002] UKIAT 439, the Appellants must show that any documents on which they seek to rely can be relied upon. The translations of both reports in the Appellants bundle (at pages 86 and 89) are incomplete and notably missing details of the complaint that was made. As such, we can place very little weight on such reports as corroborative of YG's claims. The Appellants have had ample time to submit all relevant evidence upon which they seek to rely and the burden of proof is on the Appellants to make out their case.

12. It is again in my view astonishing that experienced Counsel who represented this family before the First-tier Tribunal did not identify this omission and seek to rectify it. In fact the missing pages existed, and are now produced in this appeal by Mr Wood, who managed to find them in the files forwarded to him by the previous representatives.

13. At the hearing in March the parties invited me to set the decision of the First-tier Tribunal aside, and to remit the matter to be heard *de novo* by judges other than Judge Frantzis or Judge Hollings-Tennant. I agreed to do so for the reasons I set out above. For the record I note that the Tribunal had also dismissed the appeal on the grounds that the Honduran state was willing and able to provide a sufficiency of protection. Mr Woods had submissions to make about that, but in the cause of pragmatism Ms Young accepted that the analysis on whether protection was available was bound to turn, in this context, on the degree of risk faced by the Appellants. For that reason all findings of the Tribunal were set aside by my written decision of the 24th March 2024.

14. In view of the manner in which this case had been presented to the First-tier Tribunal I made the following directions:

> "The Appellants current representatives must start from scratch. New complete bundles must be prepared, in a logical order. A full

> medico-legal report should, if so advised, be sought in respect of IG. The parties must, before any re-hearing, prepare a schedule of issues. I am conscious that this case has already taken up a considerable amount of time in the First-tier Tribunal, and that as a remitted matter it may not have a CMR before being listed. Accordingly I consider it appropriate to retain it in the Upper Tribunal at this stage, for case management".

15. At the resulting Case Management Hearing before me today Mr Wood has produced:

- Fresh electronic bundles including all relevant evidence and certified translations. He confirmed that the Appellants have approved these bundles and have no other evidence to submit at this stage
- A table containing full names and dates of birth of all Appellants, giving a set of initials for each and explaining how they are all related
- A key passage index

16. For the Respondent Ms Young indicated that prior to the matter being relisted before the First-tier Tribunal she would liaise with colleagues to draw up a schedule of matters in issue to be agreed with the Appellants representatives.

Decision and Directions

17. The decision of the First-tier Tribunal is set aside in its entirety.

18. The decision in the appeals is to be remade following a hearing *de novo* by a Judge of the First-tier Tribunal other than Judge Frantzis or Judge Hollings-Tennant.

19. There is a currently a time estimate of 2 days and a Spanish (Central American) interpreter is required. If the parties consider, following review, that these listing directions are not accurate, the First-tier Tribunal must be informed immediately.

20. There is an order for anonymity in place.

21. The Appellant IG is to be treated as a vulnerable witness.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
21st May 2024