Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05043/2014

THE IMMIGRATION ACTS

Heard at Newport	**Remittal & Reasons Promulgated**
On 21 January 2015	**On 3 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NKM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr E Tuburu of Ty Arian Solicitors

REMITTAL AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of India who was born on 26 April 1985.

4. It is unclear when the appellant first entered the UK. However on 21 January 2011 she applied for a visit visa to Ireland which was issued on 26 January 2011. On 25 July 2011, she applied for a Tier 5 Religious Migrant visa in order to work with the Missionaries of Charity – Dublin and this visa was issued on 27 July 2011 valid until 9 September 2014. In a letter dated 11 January 2013, the Missionaries of Charity notified the Home Office that the appellant was no longer employed by them as she had absconded from the convent on 25 December 2012. As a consequence, on 6 February 2013, the appellant's leave was curtailed and the notice required her to leave the UK by 7 April 2013.

5. Thereafter, it would appear that the Sisters of Charity arranged for the appellant to return to India and a flight was booked for 25 February 2013. However, the appellant did not leave the UK. On 6 April 2013, she submitted a human rights claim relying upon Article 8 which was rejected by the Secretary of State on 25 April 2013.

6. On 18 June 2013, she was encountered by Immigration Enforcement Officers and was arrested, interviewed and served with a IS151A notice informing her of her liability to be removed. She was detained and claimed asylum on 20 June 2013. She was subsequently granted bail on 7 August 2013 and thereafter granted temporary admission with reporting restrictions.

7. On 1 July 2014, the Secretary of State refused the appellant's claim for asylum and humanitarian protection and also on human rights grounds. The Secretary of State did not accept that the appellant would be at risk on return to India from a gang or group of men who she claimed had persistently raped her between the ages of 11 and 17 after which she joined the Missionaries of Charity as a nun. Further, the Secretary of State did not accept that the appellant would be at risk from her family because she had joined the mission and become a nun.

The Appeal

8. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 22 September 2014, Judge Archer dismissed the appellant's appeal on asylum grounds. However, he allowed the appeal under Articles 2 and 3 of the ECHR. First, the judge found that the appellant was at real risk of harm from the gang who had previously raped her and from her own family in her home area. Secondly, the Indian authorities would not provide a "sufficiency of protection" to the appellant in her home area. Thirdly, it would be unduly harsh for her to internally relocate within India. In reaching those findings, and in particular the third finding, the judge found that, despite the appellant having married a Sri

Lankan national in the UK, she would return to India as a "lone mother" with a "newborn baby" which she was expecting at the time of the hearing.

9. The judge made no decision in relation to the appellant's Article 8 claim.

The Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal to the Upper Tribunal on a number of grounds. First, the judge had erred in law in finding that the appellant would return to India as a "lone woman" by disregarding the evidence of the appellant's husband that he would be willing to return to India with her if required and further in shifting the burden of proof to the respondent to establish that the appellant's husband could obtain a visa (without undue delay) to enter India as the appellant's spouse. Secondly, the judge had applied the wrong standard in finding that there was not a "sufficiency of protection" available to the appellant if returned to India. Thirdly, in finding that internal relocation was unduly harsh, the judge had failed to take into account the appellant's evidence concerning her education and her employment experience as a nun.

11. On 7 October 2014, the First-tier Tribunal (Judge Pooler) granted the Secretary of State permission to appeal. Thus, the appeal came before me.

The Submissions

12. On behalf of the Secretary of State, Mr Richards relied upon the grounds. First, he submitted that the judge's finding that the appellant would be at risk on return was predicated on his finding that she would be returning as a single woman either heavily pregnant or with a newborn baby. He submitted that the judge failed to take into account her husband's evidence that he would return with her. Further, the judge had wrongly reversed the burden of proof which was, in fact, upon the appellant in relation to whether the appellant's husband would be able to obtain a visa (without undue delay) to India. Mr Richards submitted that the judge could not have come to the conclusion he did if, in fact, the appellant would return to India with her husband. He submitted that, as a consequence, the finding in the appellant's favour under Article 3 could not stand.

13. Secondly, Mr Richards submitted that the finding that there would be a lack of "sufficiency of protection" could not stand and the appellant had never reported the incidents of rape to the police.

14. Finally, Mr Richards submitted that the judge's finding on internal relocation was flawed as it was also based on the premise that the appellant would return as a lone female.

15. On behalf of the appellant, Mr Tuburu sought to sustain the judge's findings. As regards the issue of whether the appellant would return as a

lone woman, Mr Tuburu submitted that the judge was correct to place the burden upon the respondent (who had raised the issue) of whether the appellant's husband would be able to enter India with a visa. Mr Tuburu submitted that that was the key issue in the appeal. Secondly, Mr Tuburu submitted that the judge had accepted the appellant's evidence concerning the sexual violence she had previously experienced and, in paragraph 38, the judge had properly come to the conclusion on the basis of the objective evidence that there was not a sufficiency of protection in such circumstances. He referred me to the *Operational Guidance Note* (May 2013), in particular at paragraphs 3.13.12-3.13.21. Thirdly, he also relied upon the *OGN* at paragraph 3.13.20 that internal relocation for the appellant would be unduly harsh as a single woman with a child.

Discussion

16. I deal first with the judge's finding that the appellant would return as a lone woman with a newborn baby.

17. At paragraph 35 the judge set out the evidence of the appellant's husband that:

> "he is prepared to go to India if the appellant is removed to India and he is permitted to go."

18. The judge then went on to deal with the issue of whether the appellant's husband would be able to obtain a visa to enter India as the appellant's spouse as follows:

> "He is not an Indian citizen and Mr Howells accepted that he would require a spouse visa. The husband will not be removed with the appellant because he has indefinite leave to remain in the UK. There is no evidence before me that the husband would meet the requirements of a spouse visa for India or of the timescales that would be involved. The fact that the baby will be a UK citizen may be a significant complicating factor. I find that the appellant would return to India alone; either heavily pregnant or as the mother of a new born baby."

19. As a consequence of that, at paragraph 36 the judge found that:

> "[the] appellant … will be a lone mother of a new born baby … in India".

20. It is trite to state that the burden of proof was upon the appellant to establish that there was a real risk that she would be subjected to serious ill-treatment contrary to Article 3 in India. It was accepted before me that whether she returned alone or with her husband was a relevant factor in determining whether there was such a risk. As part and parcel of that burden, the appellant was seeking to establish that she would return to India without her husband. The burden of proof was, therefore, upon her to show, albeit to the lower standard applicable in international protection cases, that she would return alone because, in the circumstances of this case, her husband would be unable to obtain entry clearance or would only do so after undue delay and so creating the circumstance in which

she claimed the risk to her from gang members and her family would arise.

21. I do not accept Mr Tuburu's submission that any burden of proof was placed upon the Secretary of State to prove (or introduce evidence) that the appellant's husband would be able to enter India. There is no good reason for casting any evidential (let alone legal) burden upon the Secretary of State. It cannot be said, in my judgement, that the Secretary of State was in a better position to produce evidence on this issue. No doubt, the appellant could have produced evidence from, for example, the Indian High Commission or other sources on the requirements for entry and whether the appellant's husband was likely to satisfy the requirements.

22. Neither representative referred me to any case law on this issue. The matter is, in my judgment, resolved as a matter of principle as I have indicated.

23. The position might well be different in an Article 8 case where the Secretary of State bears the burden under Article 8.2 of justifying any interference with an individual's private and family life and, if a live issue, whether an individual can obtain entry clearance to a foreign country (see SM and Others (Entry clearance, proportionality) Afghanistan CG [2007] UKAIT 00010). In this appeal, however, the burden of proof under Article 3 (as in a refugee claim) began and ended with the appellant.

24. Consequently, I accept Mr Richards' submission that the judge erred in law in reaching his finding that the appellant would return to India as a "lone mother of a newborn baby", a finding which is predicated upon the erroneous premise that the Secretary of State carried the burden of proving that the appellant's husband would gain entry to India.

25. Mr Tuburu accepted that this was a key issue in the appeal. At the conclusion of his submissions, he sought to argue that even if the judge were in error on this issue it was not material to the decision. I do not accept that submission.

26. First, whether the appellant returns alone or with her husband is an issue relevant to whether it would be unduly harsh for her to internally relocate. Paragraph 3.13.20 states, in the context of domestic and gender-based violence:

> "For some women in India relocation will not be unduly harsh but this is only likely to be the case where the individual is single, without children to support, able to access safe accommodation and is educated enough to be able to support herself. Some single women may also be able to relocate to live with extended family or friends in other parts of the country. However, where these circumstances do not apply internal relocation is likely to be unduly harsh".

27. It was that paragraph which the judge relied upon in paragraph 37 of his determination in concluding that it would be unduly harsh for the appellant to internally relocate.

28. The meaning of paragraph 3.13.20 of the *OGN* is not without difficulty. In substance it states that internal relocation will not be "unduly harsh" for some women in India. It then goes on to state that this is "only likely" where the individual is single, without children to support, able to access safe accommodation and is educated enough to be able to support herself. The paragraph goes on then to state that where those circumstances do not apply "internal relocation is likely to be unduly harsh".

29. The representatives did not make any submissions on the proper meaning of paragraph 3.13.20. It may well be that the paragraph is only contemplating the return of a "single" woman and then considering the circumstances where it would <u>not</u> be unduly harsh for her to return, namely where she has no children to support, has access to safe accommodation and is educated enough to be able to support herself. If a single woman does not fall within those circumstances, then internal relocation is likely to be unduly harsh. If that is correct, it says nothing about the position of a woman returning with her husband where she has children and, although the judge found otherwise, has some means to support herself through her educational background.

30. The crucial point is, however, that the judge applied this provision to the appellant because he found she was a "single" returning woman with a child. That finding, for the reasons I have given above, cannot stand and therefore the judge's finding in relation to internal relocation also cannot stand. That is, in substance, Mr Richards' third submission which I accept.

31. It may well be that the issue of whether the appellant returns alone or with her husband is also relevant to any risk to her in her home area. I do not express any concluded view on this. As I have concluded that this appeal must be remitted to the First-tier Tribunal, that will be a matter, if raised before it, for the First-tier Tribunal dealing with the remitted appeal.

32. Turning to the second issue concerning the judge's finding in paragraph 38 of his determination that the state would not provide a "sufficiency of protection" the judge's reasoning was as follows:

> "If the appellant does return to her home village then she is at serious risk of treatment that would breach her protected rights under Articles 2 and 3 of the Human Rights Convention, from the rape gang and her family. There is no evidence of a sufficiency of state protection in her home village. The objective evidence casts significant doubt on the general ability of the authorities to protect women from domestic violence or repeat sexual abuse. I find that it is reasonably likely that the appellant will be subject to violence from the rape gang or her own family and will not be able to effectively access police protection. Her ability to flee or protect herself will be severely limited by her new born baby."

Mr Richards submitted that the judge had failed to take into account in reaching his finding that the appellant had not sought state protection in India after the attacks upon her. In my judgment, that was a relevant factor which the judge should have taken into account. Further, it is far from clear upon what "objective evidence" the judge bases his comment that there is "significant doubt on the general ability of the authorities to protect women from domestic violence or repeated sexual abuse". Mr Tuburu, as I have already pointed out, referred me to the *OGN* dealing with "violence against women" at paragraphs 3.13.12-3.13.21. There is undoubtedly some evidence there that the police do not effectively or with any ready enthusiasm enforce laws or investigate complaints relating to domestic and gender violence. Paragraph 3.13.19 of the *OGN* concludes:

> "Those experiencing or fearing domestic violence, or other forms of gender-based violence are able to seek protection from the Indian authorities. However, given the lack of law enforcement safeguards, including the refusal to register domestic violence complaints, discriminatory attitudes held by the police, failures to conduct effective investigations and corruption, each case should be considered on its individual merits to assess whether effective protection will be provided."

33. In my judgment, the judge failed to give that individual consideration highlighted in the *OGN* as essential. Even though there is supporting evidence for his view, the Judge has not given adequate reasons for his finding particularly in view of the fact that he fails to take into account the appellant's own evidence that she did not seek protection from the police following the attacks.

34. For that reason, the judge's finding in relation to "sufficiency of protection" also cannot stand.

35. Thus, the First-tier Tribunal's decision to allow the appellant's appeal under Article 3 involved the making of an error of law and its decision cannot stand.

Decision and Disposal

36. Both representatives invited me to remit the appeal to the First-tier Tribunal if I set aside Judge Archer's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements*, I consider that an appropriate course of action. There are significant evidential matters which must be considered and factual findings made. The judge made no findings in relation to Article 8 because he allowed the appeal under Article 3. Art 8 may become relevant at a re-hearing.

37. The issues for the First-tier Tribunal will be

> (1) whether the appellant has established a real risk of serious harm for the purposes of humanitarian protection or Article 3 of the ECHR;

(2) whether the appellant would obtain a "sufficiency of protection" both in her home area or elsewhere to which she might internally relocate;

(3) whether, if the appellant has established the required risk and an insufficiency of state protection in her home area, whether it would be unduly harsh or unreasonable for her to relocate within India.

38. In addition, the appellant relies upon Article 8 and (to the extent it adds anything to her claim) Article 2 of the ECHR.

39. In determining the issues I have identified above, whether the appellant will return to India alone or accompanied by her husband will be a factual matter to be determined by the First-tier Tribunal as will the relevance of that to internal relocation or, perhaps, any risk to her in India.

40. I see no reason to set aside the judge's finding (untouched by the errors of law) that the appellant's account was credible in relation to her repeated gang rape.

41. Consequently, I set aside the decision of the First-tier Tribunal. I remit the appeal to the First-tier Tribunal to be determined in accordance with the above and to be heard by a judge other than Judge Archer.

Signed

A Grubb
Judge of the Upper Tribunal