



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08501/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 27 October 2015

Decision & Reason Promulgated
On 12 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

MMR
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Easty, instructed by Brighton Housing Trust
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity and confidentiality

1. This appeal was subject to an anonymity direction in the First-tier Tribunal because of the nature of the appeal and it is appropriate to make a similar order in the Upper Tribunal under Procedure Rule 14(1) to prohibit the disclosure or publication of any matter likely to lead members of the public to identify the appellant. To give effect to this order the appellant is to be referred to as MMR.
2. In addition, the Tribunal directs under rules 14(2) to 14(8) that this decision and reasons statement should not be disclosed to the appellant but should as per his agreement be sent only to his legal representatives and the Home Office because it contains information about his sister which is to remain confidential. This decision

and reasons statement can only be disclosed to the appellant with the relevant information redacted.

Background

3. The appellant was born on 1 January 1995 and is a citizen of Afghanistan.
4. He arrived in the UK on 21 October 2009 and claimed asylum. His application was refused on 18 December 2009 but as he was an unaccompanied asylum seeking child he was granted discretionary leave to remain in accordance with published policies until 1 July 2012.
5. Shortly before that leave expired he made a further claim for asylum but on 22 September 2014 the Home Office made a decision refusing to vary leave and to remove the appellant by way of directions.
6. The appellant appealed against that decision but his appeal was dismissed by First-tier Tribunal Judge C M Phillips in a decision and reasons statement promulgated on 9 February 2015. The appellant sought permission to appeal against that decision and such permission was granted on 16 March 2015.

The grounds of appeal

7. The grounds address six issues.
8. The first argument is that the judge failed to understand the relevance of his sister's refugee status to his appeal because: (i) it supports the appellant's claim that his family was targeted by militia in Afghanistan, and (ii) the appellant enjoys family life in the UK with his sister and her children. The appellant further argues that the judge erred in finding that his sister's account was not credible given the medical and other supporting evidence.
9. The second argument is related to the first insofar as it refers to a Social Service's letter which supported the account provided by the appellant's sister.
10. The third and fourth grounds argue that the judge erred in her approach to the family tracing duty on the Home Office and the inference she drew from the failure of the appellant's sister to engage with tracing through the Red Cross.
11. The fifth argument challenges the judge's finding that discounted the entirety of the expert report of Peter Marsden on the basis that the accounts were not credible when a large part of that report examined whether the appellant face a real risk on return even if his accounts were not true. The judge had no basis on which to reject those parts of the expert evidence.
12. The final argument suggests that the judge failed to engage with the appellant's private and family life rights because the judge did not properly examine the relationship between the appellant, his sister and his sister's children.

Ms Easty's submissions

13. Ms Easty relied on these grounds. She added in relation to the first ground that the judge had not made clear findings regarding what happened to the appellant's sister. The ground focused on whether the judge should have inferred from the grant of refugee status that the account provided by the appellant's sister had been accepted by the Home Office.

14. Ms Easty acknowledged that there was some confusion as to what concession was made by Ms Foot who was the appellant's advocate before the First-tier Tribunal. Ms Easty recognised the fact that Ms Foot had settled the grounds of appeal and had not raised a concern as to how Judge Phillips dealt with the concession. Ms Easty, however, argues that the decision and reasons statement showed the judge was confused and this undermined the findings.
15. Ms Easty took me first to paragraph 21 of the decision and reasons statement where it would appear that Ms Foot conceded that the sister's case had nothing to do with the appellant's case, but in her submissions, which are recorded at paragraphs 42, Ms Foot specifically argues that the appellant relies on the sister's case. The confusion in the record could only mean that the judge was confused and therefore her findings in paragraphs 70 to 75 were not sound because she did not understand the case advanced by the appellant.
16. Those findings, Ms Easty submitted, were further undermined by the failure of the judge to have regard to the West Sussex County Council Social Services letter of 6 May 2010 that confirmed that safeguarding issues relating to the appellant and his sister had been raised at that time because the appellant's sister had been threatened in the UK by a relative of her fiancé. In context this letter added weight to the truthfulness of the sister's account and therefore to the appellant's claim that his family had been targeted by militia, which was a relevant factor to consider when assessing risk on return.
17. Turning to the tracing issue, Ms Easty acknowledged that grounds three and four were not particularly strong but argued that the judge had erred at paragraph 97 by drawing a negative inference about the credibility of the appellant's sister because she had refused to engage with the family tracing scheme offered by the Red Cross. I acknowledged that it was well known to judges that the Red Cross advised those seeking to trace their family members of potential risks that tracing itself might pose to family members and that a person should not embark on such a course if it might put relatives at risk.
18. With regard to the expert report, Ms Easty identified the fact that Mr Marsden had divided his report into what risks the appellant might face in Afghanistan were his accounts to be believed and what risks he might face even if his accounts were not believed. Ms Easty submitted that the judge erred by discounting the expert evidence in its entirety simply because she had found the appellant's accounts untrue. Ms Easty said the judge had made no findings relating to the risk of recruitment to the Taliban or the risk of indiscriminate violence even though such issues were specifically addressed by Mr Marsden in a way which suggested it would be necessary to depart from the country guideline cases of the Upper Tribunal.
19. The final ground of appeal related to whether Judge Phillips had proper regard to the nature of the relationship between the appellant and his sister. The judge concluded in paragraphs 103 to 109 that the relationship did not amount to family life but that was based on Kugathas. Ms Easty reminded me that the proper approach to the assessment of family life between adult siblings was set out in see Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC) and therefore the judge's conclusions were unsustainable.

Mr Avery's submissions

20. In response, Mr Avery reminded me of the rule 24 response submitted on 25 March 2015 and argued that there were no errors in the decision and reasons statement.
21. With regard to the first issue, it was clear that Ms Foot gave a concession that the sister's case was immaterial to the appellant's appeal. The judge had no reason to go behind that concession. In any event, the judge had made her own finding of the appellant's sister and found she was not credible (see paragraph 88). That finding was open to her given the limitations of the sister's evidence. It should also be recalled that the judge found the appellant's own evidence to be suspect (see paragraphs 79 to 86) and it was in that context that the case had to be viewed.
22. In respect of the Social Services letter, in light of the concession and the limited information contained in that letter, it was unclear what the judge was supposed to do with the letter. In any event, it is clear from paragraph 89 that Judge Phillips considered that letter and came to conclusions, which cannot be said to be perverse particularly since she records that the letter was not relied on in the skeleton argument or submissions.
23. Turning to the issues arising from family tracing, Mr Avery submitted that neither aspect was material to the outcome of the appeal because there were other reasons why the sister's account was not found credible.
24. Similarly, Mr Avery argued that the allegation that Judge Phillips failed to consider the entirety of Mr Marsden's expert report was immaterial to the outcome since his conclusions were contrary to the published country guideline cases and were mere disagreement with the binding judicial findings. Mr Marsden's comments were nebulous and not founded on evidence of sufficient weight to disturb the country guideline cases.
25. As to whether Judge Phillips properly assessed the appellant's family life with his sister, even though there was no express mention of Ghising, it was clear that the judge examined the nature of the relationship and came to sound conclusions that the appellant was living an independent life from his sister and her children in paragraph 105

Decision

26. Despite the convoluted arguments presented in this appeal, the issue is in fact very straightforward. The appellant presented evidence to support his claim to have a well-founded fear of persecution in Afghanistan. A central part of his evidence related to his sister. That evidence needed to be considered.
27. There appears to have been concern and confusion as to how to present the evidence of the appellant's sister because much remained confidential to her and her right to privacy had to be respected. This is unusual if not a unique situation and having read the decision and reasons statement I can see that the judge, Ms Foot and Ms Butt (who represented the Home Office) acted appropriately. Although not stated specifically, it is clear they all had regard to rule 13 of the 2014 First-tier Tribunal Procedure Rules.

28. Despite the unusual nature of the proceedings, the judge did focus on assessing the evidence and paid careful attention to that of the appellant's sister. She rejected the primary submission that the fact the sister had been granted refugee status should be taken as a concession that the sister's account of what happened in Afghanistan was to be believed. In my view, her approach and assessment of this argument is correct in law. The appellant and his sister (and the appellant's representatives) drew that inference but in fact there was no basis on which to draw that inference.
29. Since she was not able to accept the primary submission, Judge Phillips realised she had to make her own findings regarding the credibility of the sister's account. She found there were inconsistencies in the accounts and concluded that the accounts were not credible but in so doing failed in my view to have proper regard to the medical and social worker evidence. The Medical Foundation had found that her account was consistent with their physical examination of her, which took place two years before the birth of her first child. The Social Worker identified the trauma the appellant's sister encountered in May 2010 which resulted in strong safeguarding procedures having to be put in place.
30. These were independent markers that had to be weighed but which were not weighed. At paragraph 87 the judge makes no reference to the key medical finding, that the doctor found the appellant's body showed marks "consistent with the allegation of repeated rapes." At paragraph 88, the judge makes no finding in relation to the fact that the additional safeguarding was put in place in the UK because of the potential threats arising here because of what the appellant's sister claimed had happened in Afghanistan. Instead, Judge Phillips looks at the fact the risks in the UK had lessened.
31. The failure to make relevant findings on these issues, which could change the assessment of the credibility of the appellant's sister, would perhaps also change how the judge would have assessed the risks on return facing the appellant. It is by this route that I find the legal error to be material and require the decision on credibility to be remade.
32. Because credibility needs to be assessed in the round, I do not preserve any of the credibility findings made in respect of the appellant or his sister. All the evidence will need to be reviewed and analysed by whoever next hears this appeal.

Other issues

33. I have already indicated that the Tribunal's specialised nature means it is aware that the Red Cross will advise those thinking about tracing their relatives of the potential risks to their relatives that might arise from the tracing process itself. It is for an individual to decide whether to continue with tracing and therefore it will rarely be appropriate to infer from a decision not to pursue tracing that a person is not credible. This knowledge means that I would have found the adverse credibility findings in paragraph 97 to be unsound but accept that these findings are separate from the other credibility findings and are immaterial.
34. I accept that the judge failed to properly engage with the expert evidence that the appellant would be at risk on return even if his account was untrue. Although I accept this error, I agree with Mr Avery that it was not material because the evidence provided by Mr Marsden is insufficient to displace the existing country guidance. If

the appellant seeks to pursue this aspect of his claim, then he will require stronger and more cogent evidence. But the parties will recognise that whether the expert evidence is relevant will depend on whether the appellant is found to be credible.

35. Turning to the issue of private and family life rights, I agree with Mr Avery that the judge properly assessed this aspect of the evidence. Judge Phillips correctly identified that the appellant and his sister, although close, live independent lives and could not be said to enjoy family life within the meaning of article 8(1). I therefore preserve this finding. Of course, if the appellant has new or additional evidence regarding his private and family life rights because of the passage in time, it will be for him to make a fresh human rights claim to the Home Office and not trouble the Tribunal with it further.

Decision and directions

36. I find that the decision and reasons statement of First-tier Tribunal Judge C M Phillips contains an error on a point of law in relation to the assessment of credibility. The error is such that I must set aside the decision and it will have to be remade.
37. The parties suggest, and I agree, that this is a case where remittal to the First-tier Tribunal is appropriate.
38. The remitted hearing must not be before First-tier Tribunal Judge C M Phillips.
39. The following findings and conclusions are preserved.
- a. The fact that the appellant's sister has been recognised as a refugee is not a reason of itself to find that she is a credible witness or that her account of what happened to her and her family before she came to the UK is to be believed.
 - b. On the evidence provided, the appellant has not shown that his removal would violate the UK's obligations under article 8 of the human rights convention (i.e. he has not shown that it is more likely than not that his private and family life rights would be breached).
 - c. The Tribunal cannot draw an adverse inference about credibility from a person's decision not to pursue family tracing via the Red Cross.
 - d. Mr Marsden's report is insufficient of itself to displace the Upper Tribunal's country guideline cases regarding risk of forced recruitment to the Taliban or of the article 15(c) risks to civilians.
40. In light of these preserved factors, it will be for the First-tier Tribunal to assess the credibility of the appellant and his sister and to determine if the appellant has a well-founded fear of persecution in Afghanistan for one or more convention reasons.
41. If the First-tier Tribunal concludes that the evidence is not credible, then without evidence sufficient to displace the country guideline decisions, the First-tier Tribunal will be bound by the existing country guideline decisions.
42. The parties should also remember that in the absence of fresh cogent evidence about the appellant's private and family life rights in the UK the First-tier Tribunal will be bound by the findings made by Judge Phillips.

43. It follows that the parties are free to provide new evidence to the First-tier Tribunal to address the above issues and I direct that any fresh evidence must be filed and served at least seven calendar days before the remitted hearing.

Decision

The decision and reasons statement of Judge C M Phillips contains an error on a point of law and is set aside.

I remit the appeal to the First-tier Tribunal for rehearing as per the above directions.

Signed

Date

Judge McCarthy
Deputy Judge of the Upper Tribunal