IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35120/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 February 2016

Decision & Reasons Promulgated
On 23 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MS NB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Amunwa of Counsel
For the Respondent: Ms A Fijiwala, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

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2. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing her appeal against a decision taken on 11 March 2014 to refuse her application for indefinite leave to remain as a spouse of a British citizen.

Background Facts

3. The appellant is a citizen of Nepal who was born on 17 April 1987. She arrived in the United Kingdom on 24 September 2009 with leave to enter as a Tier 4 (General) Student. Further leave as a Tier 4 Student was granted until 30 January 2012. On 25 July 2011 the appellant applied for further leave to remain as the spouse of a person present and settled in the United Kingdom following her marriage to Mr MJ, a British citizen, on 14 September 2010. This application was successful and she was granted leave to remain until 12 August 2013. On 10 August 2013 the appellant applied for indefinite leave to remain. This application was refused on 11 March 2014 and a decision was taken to remove her by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. The respondent refused the application because the appellant’s husband had written to say that their marriage had broken down and he no longer supported her application.

The Appeal to the First-tier Tribunal

4. The appellant appealed against the respondent’s decision to the First-tier Tribunal. In a determination promulgated on 7 May 2015 First-tier Tribunal Judge Kelly dismissed the appellant’s appeal. The First-tier Tribunal Judge found that the appellant had not established that her relationship with Mr J was caused to permanently break down before the end of her last period of leave as a result of domestic violence and therefore the judge found that the appellant has not satisfied the requirement under paragraph 289A(iii). The judge went on to consider the appellant’s case under Article 8 in respect of her private life. The judge found that the appellant does not meet the requirements of paragraph 276ADE finding that there were not very significant obstacles to her integration in Nepal. The judge considered Article 8 outside of the Immigration Rules finding that following the breakdown of her marriage the appellant no longer enjoys sufficient family or private life in the UK such that Article 8 is engaged at all.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal. On 13 July 2015 First-tier Tribunal Judge Colyer refused the appellant permission to appeal. The appellant renewed her application for permission to appeal to the Upper Tribunal. On 11 September 2015 Deputy Upper Tribunal Judge Chapman granted the appellant permission to appeal. In the grant of permission Judge Chapman set out that it was arguable that the judge had erred materially in law in making selective findings and failed to make a finding as to whether or not the appellant was subjected to domestic violence by her former husband. The grant of permission also sets out

that it is arguable that the judge erred in failing to consider and apply the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 when assessing proportionality.

The Hearing before the Upper Tribunal

6. Mr Amunwa submitted a skeleton argument and bundle of authorities on the day of the hearing. The skeleton argument contained grounds in relation to the appellant being a vulnerable witness and Article 8. No appeal had been made on the basis that the appellant ought to have been considered by the judge as a vulnerable witness and there was no appeal against the Article 8 findings. Two separate sets of grounds of appeal had been lodged and these arguments were not contained in either of them. No application had been made to amend the grounds of appeal. When I raised this with Mr Amunwa he indicated that he wished to make such an application now. He submitted that although it was not argued before the First-tier Tribunal Judge that the appellant ought to have been considered as a vulnerable witness the guidance produced by the President should have been applied by the judge as a matter of course. The judge has to have regard to it. He submitted that in the grounds of appeal there is a reference to Section 117B and that, he submitted, is to be implied to be in reference to Article 8.

7. Ms Fijiwala opposed the amendment. She submitted that these were factors that were not raised before the First-tier Tribunal and not raised in the grounds of appeal. She submitted that the respondent was ambushed having only become aware of these arguments on reading the skeleton argument today.

8. I refused the application to amend the grounds of appeal in relation to Article 8. No appeal was lodged against the findings of the judge with regard to Article 8. Two separate sets of grounds of appeal for permission were lodged and in neither of those was there any appeal against the Article 8 findings. I allowed the application for amendment on the basis that the First-tier Tribunal Judge ought to have considered whether or not the appellant was a vulnerable witness, however in light of the fact that the respondent has not had an opportunity to consider this issue I directed that the respondent provide written submissions within seven days of the date of the hearing. The appellant then has three days in order to respond to those submissions.

Summary of the Submissions

The Appellant's Submissions

9. I permitted the appellant to amend the grounds of appeal to include a new ground of appeal essentially that the judge should have applied the Joint Presidential Guidance Note No 2 of 2010; Child, vulnerable adult and sensitive appellant guidance' (the 'guidance') on vulnerable witnesses because a person presenting with assertions of sexual abuse would be

prima facie within the guidance. Mr Amunwa relied on paragraphs 14 and 15 of the guidance and for the need for the evidence to be treated in light of the vulnerability of the witness. He submitted that the judge ought to have taken into account that vulnerability where there were discrepancies in the evidence. He submitted that the Tribunal also needs to record whether or not the judge found the appellant to be vulnerable. Mr Amunwa referred to paragraph 31 of the Tribunal decision where the judge acknowledges that relationships are complicated, however he submitted that this does not go far enough. This is the only recognition by the judge that the appellant's relationship and her account of it might be open to different interpretations. His submission was that the judge throughout takes against the appellant on the basis that she should have told the Home Office in March 2014. He said the key point as to why consideration ought to be given to the vulnerability of a witness is to remind judges that people who have experienced abuse do not necessarily behave or make disclosures at the relevant time. He submitted that had this been taken into account the judge would have considered more fairly when the disclosure was made.

10. It is asserted in the grounds of appeal that the First-tier Tribunal Judge's determination is perverse as she dismissed the appeal on the basis that she found the credibility of the appellant to be undermined by the discrepancy between her account and that of her friend Ms K. It is asserted that the judge was selective in her approach regarding the evidence of the appellant and that of her friend. Mr Amunwa submitted that this was an unusual case in that rather than the appellant being found to have embellished her case it was the other witness who embellished the case. He submitted that at paragraph 31 there is a theme in the First-tier Tribunal judgment as to why he disbelieved the appellant. The judge set out that she asserted that sometimes her husband was controlling but other evidence suggested sometimes that he was not. He asserted that a victim of domestic violence may present their case in this way.

11. In the renewed grounds to appeal the appellant relies on the case of **JL (Domestic violence: evidence and procedure) India [2006] UKAIT 00058,** in particular the head note which reads: *'Evidence of domestic violence. If (but only if) there has been a valid application, the Immigration Judge is not confined on an appeal to the evidence required by the Secretary of State, nor is an appeal bound to fail if the required evidence has not been produced.'* It is asserted that weight could have been given to the correspondence sent to Hampshire Constabulary to show that the appellant was not fabricating her claim concerning her husband's recording of her in the bathroom. It is submitted that the First-tier Tribunal Judge took issue with the timing of the appellant's claim to domestic violence and it is asserted that the judge failed to consider the fact that the Tribunal was the correct medium for the appellant to explain the domestic violence and that the respondent should have interviewed her or investigated the matter with her after her husband had written to the Home Office regarding their marriage.

12. Mr Anumwa submitted that the judge, at paragraph 34, outlines the position that there is no documentary evidence. He submitted that there was evidence and that the judge ignored the letters from the solicitors to Hampshire Constabulary, there was no consideration of those documents. He indicated that the appellant now has a response in respect of this incidence. The judge erred in considering what material was there to independently verify the claim. He submitted that this is an error of law that taints the decision as a whole.

13. It is asserted that the judge failed to make any findings in respect of the appellant's statement that she could have remained in the matrimonial home with her husband when her application was still outstanding and wait for the grant of indefinite leave.

14. It is asserted that the judge did not take into account the mandatory provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act') when determining the weight to be given to the public interest when assessing proportionality.

The Respondent's Submissions

15. A skeleton argument was submitted in response to the amendment to the grounds of appeal. The respondent asserts that there was no documentary evidence before the First-tier Tribunal judge to suggest that the appellant was a vulnerable witness. It is asserted that the guidance defines what is meant by a vulnerable witness and that the appellant's claimed vulnerability does not factor into the definition and therefore the judge did not need to have regard to the guidance. It is submitted that paragraphs 14-15 of the guidance only is relevant where the appellant has been identified as a vulnerable witness.

16. The respondent filed a Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. It is submitted that the First-tier Tribunal decision is detailed, the judge considered all the evidence, applied the relevant case-law and gave satisfactory reasons. It is submitted in the reasons for refusal response that it is not clear how application of s 117B of the 2002 Act would assist the appellant. The respondent submits that the judge correctly applied the ration of Singh [2015] EWCA Civ 74. S 117B only applies where there was a venture into a freestanding Article 8 proportionality assessment.

17. In relation to credibility she relied on the Rule 24 response and the detailed decision of the First-tier Tribunal when refusing permission to appeal. She submitted that the judge is entitled to attach weight to the discrepancies that emerged in oral evidence. The judge was entitled to take into account and attach credence to the evidence of the witness K over the appellant. There was a clear discrepancy which enabled the judge to consider there were credibility issues. The judge said, at paragraph 14, that the appellant asserted that her husband had never hit her, whereas at 25 the judge sets out that the witness K said that he had

hit and kicked her. This witness was relied on by the appellant and the judge was therefore entitled to consider her evidence fully and attach weight to it.

18. With regard to the submission that if the appellant lacked integrity she could have stayed in the matrimonial home until she got her refusal, she submitted that this is merely a point that is being reargued having been found against the appellant by the First-tier Tribunal Judge.

19. She submitted that at paragraph 30 the judge was entitled to take into consideration that the appellant did not notify the respondent of changes in her circumstances. She submitted that although the appellant raises this as a point regarding a vulnerable witness, the judge referred both to the position in March 2014 and September 2014 when the appellant had not thought to tell the respondent that her circumstances had changed. He was entitled to find that this undermined her credibility.

20. At paragraph 31 the judge found that she was able to attend college and take employment. He noted that there was nothing in the evidence of the witness K that the appellant was forced to accompany her husband when he was working driving buses. She submitted that the judge set out at paragraph 34 that he took into consideration that there was no legal requirement for documentary evidence, however he was quite entitled to consider that one would normally expect to see corroborating evidence in a case such as this.

21. The judge was aware that the letters to the Hampshire Constabulary existed, he referred to them at paragraph 10. She submitted that the judge could not make findings as these letters only established that information has been sought, they cannot take the appellant's claim any further. She also submitted that there was no evidence that the letters were sent.

Discussion

Vulnerability of the Appellant

22. It is contended that the judge ought to have applied the 'Joint Presidential Guidance Note No 2 of 2010; Child, vulnerable adult and sensitive appellant guidance' (the 'guidance') and that the judge did not adequately consider the vulnerability of the appellant when assessing her general credibility. The appellant was represented by counsel at the First-tier Tribunal hearing. There was no submission before the First-tier Tribunal that the appellant was a vulnerable witness. She does not fall to be considered as a witnesses that is vulnerable 'by definition' as she does not fall within the meaning of a vulnerable adult in s59 of the Safeguarding Vulnerable Groups Act 2006 or as a 'sensitive witness' which is defined as meaning an adult witness where the quality of evidence is likely to be diminished on account of fear or distress in connection with giving evidence. In identifying witnesses outside those 'by definition' categories

it would be a matter for a judge to consider on the basis of evidence, submissions and/or the witness's demeanour and responses given in oral evidence as to whether or not the witness was to be regarded as a vulnerable witness. No evidence was provided that would have raised issues as to the vulnerability of the witness such as medical reports etc. There is nothing in the grounds to suggest that the witness had difficulty in giving evidence at the hearing. I do not accept Mr Amunwa's submission which was essentially that an assertion of sexual abuse gives rise to an automatic presumption that the witness is vulnerable. In any event I do not consider that even if the appellant had been treated as a vulnerable witness the extent of the discrepancies and the nature of those discrepancies between the evidence of Ms K and the appellant (considered below) could have been explained by or resulted from the appellant's vulnerability. I do not consider that the judge materially erred in law by failing to consider the guidance.

Assessment of credibility

23. The appellant has a high hurdle to overcome in order to demonstrate that the First-tier Tribunal's decision is perverse. The appellant asserts that the judge has been selective in his approach regarding the evidence of the witness Ms K and the appellant. The judge sets out from paragraph 11 to paragraph 22 in considerable detail the evidence of the appellant. The judge then sets out from paragraphs 23 to 26 the evidence of the three witnesses called on behalf of the appellant. The judge has set out from paragraph 29 his reasons for reaching the his conclusions.

24. At paragraph 31 the judge set out certain of the discrepancies in the evidence presented by the appellant and Ms K:

> "… On the one hand, she painted Mr J as a person who sought to "control" her and who refused to let her go to college or to work or stay in touch with others. On the other hand, Ms K said that the appellant attended college twice a week throughout the time that she lived with her and the Appellant herself said she was able to undertake two separate periods of employment at the care home during the course of their marriage. Ms K did not refer to the Appellant being forced to accompany Mr J to work as he drove a bus."

25. Those discrepancies led the judge to consider that the appellant had not given an accurate description of her life with Mr J. Having found that the appellant had not given an accurate description of her life the judge sets out at paragraph 32:

> "I also found the credibility of the appellant's case as a whole to be undermined by the discrepancy between the appellant's account that Mr J never raised a hand to her or assaulted her, and Ms K's evidence that she had witnessed Mr J kicking, hitting and slapping her".

26. Although the grounds assert that Ms K had probably embellished her statement to make things better for the appellant, she was called as a

witness in support of the appellant's case by the appellant. The judge was entitled to take into consideration the discrepancies between that evidence and that of the appellant and to conclude that they undermined the credibility of the appellant's case as a whole.

The timing of the domestic violence claim

27. Although the appellant's evidence was that she finally left Mr J in March 2014. The judge notes at paragraph 30 that the letter from Mr J withdrawing his support for the appellant's application is dated 5 November 2013. The judge notes that this suggests that they were living apart by that time. The judge considered that at no time prior to the refusal or prior to September 2014 did the appellant get in touch with the respondent and when she did contact the respondent this was for the purpose of finding out whether her application had been decided, not to notify them that she was separated from Mr J. The judge did not accept that this failure could be explained by the suggestion that she had other things on her mind and found that it would be reasonable to expect the appellant to have advised the respondent of her changed personal circumstances. The judge considered it significant that the appellant's claim to be a victim of domestic violence was not raised until it was clear that there was no other basis upon which her application for leave to remain in the United Kingdom might succeed. Mr Amunwa submitted people who have experienced abuse do not necessarily behave or make disclosures at the relevant time. Whilst I accept that submission as a general proposition, the judge had the benefit of seeing and hearing the appellant giving evidence at the hearing when assessing her overall credibility. This was one factor in reaching the overall conclusion that the appellant had not satisfied him that the relationship had broken down as a result of domestic violence. The findings reached by the judge were reasonably open to him on the evidence.

Appellant could have remained in family home

28. It is asserted that the judge failed to make any findings in respect of the appellant's assertion that she could have remained in the matrimonial home with her husband when her application was still outstanding. There is no requirement on a judge to make findings on every specific assertion made by the appellant.

Documentary evidence

29. The grounds assert that the judge ought not to have weighed against the appellant the lack of documentary evidence and the appellant relies on the case of **JL**. It is asserted that the judge could have placed weight on the correspondence that might have come from Hampshire Constabulary to show that the appellant was not fabricating her claim concerning her husband's recording of her in the bathroom. This is entirely speculative. All that was in front of the judge were two letters writing to ask for information. They do not establish anything. In the absence of the

evidence the judge was quite entitled not to place any weight on the letters. At paragraph 34 the judge took into consideration that there was no legal requirement for documentary evidence.

Section 117B of the 2002 Act

30. There is no appeal against the findings of the judge in relation to Article 8, however the appellant asserts that the judge erred by not taking into account the mandatory provisions of Section 117B of the 2002 Act. The judge considered the appellant's case under Article 8 outside the Rules but concluded that she no longer enjoys sufficient family or private life in the UK such that Article 8 is engaged at all. There being no appeal against that finding, there was no requirement for the judge to consider the statutory provisions contained in Sections 117A to D of the 2002 Act (see **Bossade (ss 117A–D interrelationship with Rules) [2015] UKUT 00415 (IAC)**). It is only in conducting the proportionality exercise that the provisions in Section 117B come into play. In any event, those provisions would not provide any assistance to the appellant as her status in the UK has always been precarious and therefore little weight would have been attached to her private life.

31. The findings of the judge were ones that were open to him to come to on the evidence before him. There are no material errors of law in the First-tier Tribunal decision.

Notice of Decision

The appellant has not discharged the burden upon her of showing that there is any material error of law in the First-tier Tribunal decision, without which that decision is not susceptible to being set aside. The appeal is therefore dismissed. The decision of the respondent stands.

Signed P M Ramshaw Date 20 February 2016

Deputy Upper Tribunal Judge Ramshaw