



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA140092016

THE IMMIGRATION ACTS

Heard at Field House
On 2 May 2017

Decision & Reasons Promulgated
On 26 June 2017

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

B M

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U. Dirie, Counsel instructed by J McCarthy Solicitors

For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan, born in 1987. She arrived in the United Kingdom on 31 March 2016 and made a claim for asylum on arrival. In a decision dated 26 September 2016 the respondent refused the asylum and human rights claim.
2. The appellant's appeal against that decision came before First-tier Tribunal Judge C. H. O'Rourke at a hearing on 30 January 2017, following which he dismissed the appeal on all grounds.

3. The basis of the appellant's claim for asylum and related Article 3 claim is that she is of Hazara ethnicity. She and her family were harassed for about a year by a man named [Z] who wanted to marry her. The appellant and her family were threatened by [Z] and his associates, causing the appellant's family to move to Kabul.
4. She lived there for 10 years and became engaged. [Z] appeared again having tracked her down and made threats to her father resulting in arrangements made by the appellant's father for her to leave Afghanistan.
5. The appellant claims that she and her (now) husband in the UK cannot return to Afghanistan because [Z] and those associated with him would find her and kill her. Likewise, the security situation is such that they could not return, and the appellant's Hazara ethnicity would put her at risk.
6. In relation to Article 8 of the ECHR, she is married to MH, a British citizen, who suffers from learning disabilities, and is a person who requires a full-time carer. He would not be able to accompany her to Afghanistan. They have a genuine and subsisting relationship and the appellant is pregnant, her husband being the father.

The grounds and submissions

7. Complaint is made in the grounds about the FtJ's assessment of credibility with reference to her interview. The grounds state that "shortly before the interview" the appellant had suffered a miscarriage and that this was undoubtedly an extremely upsetting event for her. The grounds refer to evidence of the appellant's upset and distress during the interview. However, the FtJ had said that the appellant had been able to give lengthy and detailed answers to questions rather than monosyllabic "don't know" answers that might have been expected in such circumstances. The grounds assert that it was inappropriate for the judge to impute 'typical' behaviour to the appellant as someone who had suffered a traumatic event such as a miscarriage. His assessment of discrepancies in her account in that respect was therefore flawed.
8. As regards the FtJ's conclusion that the appellant is not in a genuine and subsisting relationship with her husband, his findings were "discriminatory and speculative" in terms of the conclusion that it was impossible for a meaningful marriage to have taken place given her husband's disabilities and that the appellant's role was much more akin to that of a carer rather than a wife. There was no evidence before the FtJ to the effect that the appellant's husband lacked capacity to make decisions for himself, including in terms of whether he was able to enter into a relationship. Although the appellant's husband had not given evidence, he had attended the hearing to support the appellant and he is the father of her unborn child. It is asserted that the FtJ's approach is contrary to Article 23 of the United Nations Convention on the Rights of Persons with Disabilities.
9. Furthermore, the FtJ's comment that the appellant was, in effect, trafficked is speculative and without foundation. If the FtJ genuinely thought that the appellant was trafficked there was a duty upon him to refer her to the National Referral Mechanism ("NRM").

10. It is finally asserted in the grounds that the FtJ erred in failing to adjourn the hearing, although in submissions on behalf of the appellant that inclusion in the grounds was said to have been in error.
11. In submissions Ms Dirie relied on the grounds. She confirmed that the challenge to the FtJ's decision was not only in relation to the Article 8 conclusions, but also in terms of asylum and Article 3.
12. The grounds in relation to the FtJ's approach to the asylum interview were reiterated. Although the FtJ said that there was no evidence that the appellant had suffered a miscarriage, at the start of the asylum interview it was noted that documents in relation to the miscarriage had been provided. Although the appellant in the interview had said in answer to question 127 that she wanted to continue with the interview, the question arises as to the extent to which she was able to engage with the interview.
13. The conclusion that the appellant is likely to have been trafficked with the connivance of her family and that she had no choice in the matter, is discriminatory and speculative. Although the appellant's husband has learning disabilities and epilepsy, it goes too far to suggest that he therefore lacked capacity to enter into a relationship or marriage with the appellant. I was referred to the Mental Capacity Act 2005, in particular at section 1(2) to the effect that a person must be assumed to have capacity unless otherwise established. Furthermore, in terms of the subsistence of the relationship, it was relevant that at the time of the hearing the appellant was pregnant, and that her husband attended the hearing before the FtJ, as he had done at this present hearing.
14. Mr Melvyn submitted that it was not clear that the grounds of appeal to the Upper Tribunal included complaint about the FtJ's findings on asylum and Article 3. His conclusions in those respects do not appear to be challenged, other than in relation to what is said about the miscarriage some months before the interview.
15. In any event, the appellant's skeleton argument before the FtJ did not rely on that issue and there was no argument before the FtJ in terms of the relevance of the appellant's miscarriage. In the asylum interview the appellant gave lengthy answers to questions. A break was given, and at no time did her representatives ask for the interview to be 'adjourned', and they did not write afterwards to say that the appellant had not been given the chance to answer questions because of vulnerability.
16. In terms of the nature of the appellant's relationship with her husband, the FtJ had set out the evidence and made findings on it. He had considered the medical evidence. There was a report in 2010 and then another five years later. The appellant's husband was described as an "extremely vulnerable adult" and therefore the description of his learning difficulties as "severe" was appropriate and open to him. The medical evidence was in any event very sparse. There was little up-to-date evidence at the time of the hearing in relation to his condition.

17. The decision letter considered the medical evidence and challenged the relationship between the appellant and her husband. It was therefore incumbent on the appellant to provide up-to-date evidence.
18. Although the FtJ did use the word 'trafficked' with respect of the appellant, and a better choice of words might have been more appropriate, it was nevertheless clear that the FtJ found that the appellant was brought to the UK to care for her husband, and there was no genuine and subsisting relationship. The appellant's grounds have taken the FtJ's use of the word 'trafficking' too literally.
19. Furthermore, it was open to the FtJ on the evidence to find that the appellant's husband did lack capacity. They do not live together and the reasons given for that were contradictory.
20. In reply, Ms Dirie submitted that the FtJ was not in a position to assess the appellant's husband's capacity from the evidence before him. Furthermore, even if the appellant is her husband's carer, that does not mean that there is not a genuine relationship.
21. There was no evidence that the appellant was unhappy in the relationship and her evidence was to the contrary, stating that she loved her husband. If it had been thought that she had been trafficked, some action in that respect should have been taken.

Conclusions

22. Whilst the grounds could be clearer in this respect, I am satisfied that the grounds do relate to the FtJ's conclusions in terms of the protection claim, as well as his conclusions in relation to Article 8.
23. However, the only complaint in relation to the assessment of the asylum claim concerns the FtJ's treatment of the asylum interview. Specifically, this relates to para 19.ii. of the decision. Under the heading "Appellant's Credibility" the FtJ said as follows:

"I note that the Appellant states that she had a miscarriage approximately two months before her substantive interview and while such an event will no doubt be extremely upsetting, it does not, in my view, without medical evidence, account for the glaring discrepancies in her account. She was asked at the outset of the interview whether she was feeling well enough to be interviewed and she said '*I am well*' and went on to give many lengthy and detailed answers to questions, rather than perhaps monosyllabic or 'don't know' answers that might be expected in such circumstances ...".
24. The FtJ then went on to give reasons as to why the appellant was not a credible witness.
25. As to whether the appellant had in fact suffered a miscarriage prior to the interview, later in his decision at para 19.iv.d he did express some doubt about that, stating that there was no medical evidence in that respect, and that the references in the medical reports were to her self-reporting the miscarriage after the event.

26. I was not referred to any direct medical evidence to support the claim that the appellant had suffered a miscarriage prior to her asylum interview. Having said that, this is a matter that the appellant has been consistent about, and about which she made repeated reference during the asylum interview. It is referred to in the medical records, albeit that the FtJ was correct to characterise those references as the appellant's self-reporting of the incident after the event, in other contexts.
27. However, that aside, the FtJ's observations at para 19.ii. appear to be predicated on the assumption that the appellant had suffered a miscarriage. Such is evident from his having said that such an event would no doubt be extremely upsetting. His reference there to medical evidence seems to me to be a reference to medical evidence about her ability to answer questions, rather than medical evidence in relation to the miscarriage.
28. Just in relation to the date that she is said to have had a miscarriage, it was submitted before me that it was in July 2016. That is a date that is consistent with the document at page 22 of the appellant's supplementary bundle which, albeit very difficult to read because of the printing, appears to be a hospital admission form stating that she had a miscarriage "2/12 ago", the date of the form being 16 September 2016.
29. Complaint is made about the FtJ having said that rather than giving many lengthy and detailed answers to questions, her upset at her miscarriage might be expected to have resulted in, perhaps, monosyllabic or 'don't know' answers. To some extent there is merit in that criticism. It is not clear why the FtJ thought that a person so affected would give monosyllabic or 'don't know' answers. Grief or trauma plainly may affect different people in different ways. I do consider that that particular comment by the FtJ was without foundation and was highly speculative.
30. It is also true, as the grounds suggest, that the appellant said on more than one occasion during the interview that she had been very deeply affected by the miscarriage. Indeed, in answer to question 2 she said that since the loss of her baby she had been affected deeply, was very upset and hurt, and could not remember things.
31. However, looking at the interview it is clear that the appellant did, as the FtJ said, give many lengthy and detailed answers to questions. Likewise, at the start of the interview the appellant confirmed that she was well enough to be interviewed. At question 125, when the appellant became upset when answering questions about threats that she said were made to her, and after a break of five minutes, notwithstanding that she is recorded as having been crying and said that she was very upset because of the loss of her baby she confirmed that she wanted to continue with the interview. Prior to that, she was invited to take five more minutes to try to compose herself although she was told that the interviewer did want to try to finish the interview that day. No representations in relation to the interview were made by her legal representatives after the interview, once they became instructed.

32. There is plainly an overlap between the asylum/Article 3 claim and the Article 8 aspect of the appeal. The FtJ's adverse credibility findings, both in relation to the interview and generally, traverse both areas.
33. In para 19, his reasons for finding the appellant not to be a credible witness refer to the appellant's "complete inability" to recall even the approximate dates for her marriage, her departure from Afghanistan and the recurrence of the threats from [Z]. He noted that recollection of precise dates may not be as important in Afghanistan as it is in the West, but he noted that she was educated, having attended school to the age of 17 or 18. He did not accept that she would not in the circumstances be able to recall even approximate dates for such events.
34. He referred to the appellant's multiple references to her husband as her fiancé (referring to the asylum and screening interviews). He said that her excuse that she had forgot that she was married (question 4 of the asylum interview) was deeply implausible.
35. He also referred to contradictory evidence as to whether or not her husband had visited her in Afghanistan. This appears to be a reference to inconsistency between her asylum interview (questions 25 and 26) that her husband had come to Kabul to ask for her hand in marriage, and her witness statement to the effect that he had never travelled to Afghanistan, and her brother-in-law's evidence that the marriage was conducted over the phone in October 2013. The FtJ concluded that it was simply not credible that she would not remember that her husband had not in fact come to Afghanistan and that the entire arrangement and the marriage had been conducted over the phone.
36. In relation to the claimed risk from [Z], the FtJ said that that was not credible because of her lack of credibility generally. He also said that there was inherent implausibility in [Z] being able, or having the motivation, from another province, to track down her and her family in a populous city like Kabul, after an interval of 10 years. He by then was 70 or 80 years of age. He stated that it would seem much more likely that if he was as powerful and influential as the appellant had claimed, her family would either have not been able to, or indeed wished to, deny his demands. In the alternative, he would have quickly located them in Kabul, as opposed to 10 years later. He also said that there was a lack of any corroborative evidence of the existence of this person.
37. As I have indicated, the challenge to the asylum and Article 3 claim is limited in the grounds to the narrow attack on the FtJ's comments about the asylum interview, to which I have referred. However, I am not satisfied that there is any error of law in the FtJ's conclusions with respect to the interview, notwithstanding what I have said about the FtJ's speculation about what answers the appellant might have been expected to give in the light of her state of mind.
38. Furthermore, the FtJ was entitled to take into account against the appellant her seeming inability to recall even approximate dates for key events, including her marriage; likewise, the references to her husband as a fiancé, rather than her

husband, given the contention that the marriage took place in October 2013 (and the interview being in August 2016). The inconsistency in relation to whether or not her husband ever in fact went to Afghanistan to meet her before the marriage is similarly a significant matter that the FtJ was entitled to take into account.

39. In addition, no complaint is made in the grounds, or was made in submissions before me, in terms of the FtJ's assessment of the inherent implausibility of the appellant's account in relation to [Z] and his ability or motivation to track her down after an interval of 10 years, and the FtJ's further assessment as to why that was an unlikely scenario.
40. Although the FtJ referred to the lack of any corroborative evidence of the existence of [Z], which I consider to be a very weak basis for an adverse credibility finding on the facts of this case, no complaint has been made about it in the grounds or in submissions. It is however, not a central feature of the FtJ's conclusions which are otherwise legally sustainable.
41. As regards the appellant's relationship with MH, the central argument relates to the FtJ's conclusion that he lacked capacity to enter into a marriage.
42. There is, it seems to me, a real question about whether the appellant and MH are actually married according to English law. However, this is not an issue that was explored before the FtJ, or before me. For present purposes, it is probably not material.
43. The FtJ was required to make an assessment of whether there was a genuine and subsisting relationship between them as husband and wife, or as partners. He was entitled in that assessment to take into account other aspects of the appellant's credibility, and he did so.
44. The grounds on behalf of the appellant mischaracterise the FtJ's conclusions at para 19.iv.c. The grounds suggest that the FtJ concluded that the appellant's husband's disabilities made it impossible for a meaningful "marriage" to have taken place. However, the FtJ in fact said in that paragraph that the nature of his disabilities renders it impossible that "any meaningful marriage *ceremony*" (my emphasis) could have taken place.
45. It does seem to me that the FtJ was entitled to come to that conclusion in the light of the evidence as to MH's mental state. The GP's letter dated 7 October 2010 at page 13 of the appellant's main bundle states that he suffers from learning disability and epilepsy, that he has very poor communication skills, can only say three words in English and that his native tongue (Dari) he is unable to speak clearly and has difficulty understanding others speaking it. It states that he is unable to write and has no concept of money or numbers. All communication and history was taken through his brother.
46. The more recent evidence dated 16 June 2015 (page 11) from the same GP's surgery states that MH is unable to communicate his difficulties to the doctors. He is again described as having a diagnosis of learning disability and epilepsy. The letter goes

on to confirm matters previously referred to in the 2010 letter, adding that he has no concept of money and little concept of numbers. Although he had lived in the UK for a while, his ability to learn the language did not appear to be present. He was able to dress, wash and toilet himself but was not able to cook or make himself a cup of tea. It states that he is “an extremely vulnerable adult” who requires a full-time carer and guidance which he is luckily getting from his brother and sister-in-law. He would not be capable of independent living without constant guidance from others, it states. As a matter of interest, the letter refers to his residency status preventing his access to much of the community services that would benefit him.

47. The evidence before the FtJ was that the marriage had been conducted over the phone in October 2013. In the light of the evidence to which I have referred and which was before the FtJ, supplemented by the written and oral evidence of the witnesses, he was entitled to conclude that the nature of MH’s disabilities rendered it impossible that any meaningful marriage “ceremony” could have taken place. It is difficult to see how MH could have communicated his assent to a marriage in circumstances where his communication skills are so poor that he, effectively, needs to communicate through his brother.
48. More widely, in terms of his ability to assent to a married relationship, the same considerations apply. He is described as being extremely vulnerable, having a learning disability.
49. Whilst it is true that s.1(2) of the Mental Capacity Act 2005 states that a person must be assumed to have capacity unless it is established that he lacks capacity, the fact is that the medical evidence put before the FtJ raised a significant question about whether MH does have capacity in the legal sense. It is to be remembered that it is for the appellant to prove her case. In circumstances where there is evidence to raise a question about the capacity of a party to enter into a marriage, and indeed to be party to a marriage, it is for the appellant to establish that the person concerned does have capacity. No medical evidence was put before the FtJ which indicated that MH does have capacity to enter into a marriage. Such evidence could reasonably be expected in the light of the evidence as to his learning disability.
50. Although it appears that MH and the appellant have, or have had, a sexual relationship which has resulted in the appellant now being pregnant, that in fact reveals very little about MH’s capacity to enter into a marriage. It is not suggested that he has any physical disability, except to the extent that his physical abilities are limited by his mental state.
51. More widely, it is also significant that the appellant had been unable to recall even the approximate date for her marriage. She had been inconsistent about her references to him as her fiancé or her husband. In her evidence before the FtJ, recorded at para 14, explaining why she could not remember the date of her marriage, she said that she had not read the marriage documents. The FtJ referred to the entire focus of her brother-in-law’s evidence as being the requirement to find “any wife” for his brother, who could take over the need to care for him, following

the death of their father. The phrase “any wife” appears in the FtJ’s decision as a quotation from the oral evidence.

52. Furthermore, the FtJ was entitled to take into account the fact that the appellant does not live with MH, and there was inconsistent evidence between the appellant and her brother-in-law as to the reasons for that.
53. Whilst the FtJ’s assessment that their relationship was “transactional” is rather a blunt way of putting it, I do not consider that it can be said that his conclusion in that respect was in error. What the FtJ plainly meant was that this was not a relationship of two persons committed to each other with reciprocal or mutual emotional feelings, but that it was one in which in fact neither party was engaged in the relationship or committed to it as a married relationship.
54. In those circumstances, I am satisfied that the FtJ was entitled to conclude that neither Appendix FM, nor Article 8 more widely, were engaged in terms of family life.
55. There is no specific complaint in relation to the FtJ’s findings in terms of return to Kabul. The FtJ noted that the appellant’s family continued to live there and, on his findings, are not under any pressure from [Z] and that they could therefore re-accommodate and care for the appellant. She would not therefore be a lone female and would not be at any greater risk in Kabul than she was before she left. Although she was in the early stages of her pregnancy, he concluded that there was no reason to assume that her child would not be safely born in Kabul. He noted that the appellant clearly missed her family and feels isolated and neglected in the UK. He concluded, justifiably, that there would not be very significant obstacles to her integrating in Afghanistan.
56. No wider arguments in relation to Article 8 in terms of the appellant’s child, or the child’s relationship to its father, have been advanced. In any event, as at present, the child is unborn and as such does not have protected rights as a child.
57. In all the circumstances, I am not satisfied that there is any error of law in the FtJ’s decision in any respect. His decision to dismiss the appeal on all grounds therefore stands.

Decision

58. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal on all grounds therefore stands.