Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04228/2017

THE IMMIGRATION ACTS

Heard at Piccadilly Exchange, Manchester	**Decision & Reasons Promulgated**
On 24th January 2018	**On 26th January 2018**

Before

UPPER TRIBUNAL JUDGE COKER

Between

TAUSEEF MUMRAIZ KHAN

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ell instructed by Mamoon solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant sought and was granted permission to appeal a decision of First-tier Tribunal judge Thorne who dismissed the appellant's appeal against the refusal of his human rights claim; the respondent maintained the decision to deport him pursuant to s3(5)(a) Immigration Act 1971 and paragraph 396 Immigration Rules.

2. In granting permission to appeal UTJ Gleeson said:

> The appellant challenges that decision [the deportation] on the basis that the First-tier Tribunal Judge erred by failing to give anxious scrutiny to this appeal. The matters challenged are the weight to be given to the independent social worker evidence, and two findings of fact, the first that the appellant gave evidence in Bengali, not Urdu, and the second that his wife is dependent on public funds, which the appellant says is not the case. The file contains the record of proceedings for a different appeal, in in which that was the factual matrix.
> The reasoning in this decision contains extensive quotations from and summaries of relevant cases, but there is little reasoning on its application to the facts. In particular, the Judge has not directed his mind to section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). That is an arguably material error of law.

3. The front sheet of the Record of Proceedings does refer to another case both by name and by appeal number, both of which have been crossed out and replaced with this appellant's name and appeal number. The interpreter remains recorded as Bengali rather than Urdu. I note that the hearing took place on 3rd July 2017 and the decision was promulgated on 28th July 2017. It is of concern that the Record of Proceedings appears to be for a different case, particularly where nearly a month has elapsed before the decision is finalised. However, I have looked through the handwritten notes of hearing and identified references to page numbers of the bundle filed on behalf of this appellant. Although Mr Ell did not have a copy of the Record of Proceedings from the appellant's previous representative, Mr Bates was able to confirm that the references appeared to coincide with the minute of the hearing made by the presenting officer before the First-tier Tribunal. I have also looked further at the note taken by the judge and am satisfied that it reflects this appellant's hearing rather than a different appellant. There is no error of law and no perceived unfairness arising which appears, after further consideration, to be no more than the utilisation of a different cover sheet to the Record of Proceedings.

Background

4. On 1 September 2016, the appellant was convicted of two sexual assaults on 2 females and sentenced to 6 months imprisonment. The respondent decided to make a deportation order against the appellant under s5(1) Immigration Act 1971 because "[his] presence in the UK is not conducive to the public good." The respondent accepts that at the time of the decision he had family life with his wife and one child, born 29 August 2015. Since then he and his wife have had another child, born 10 March 2017. All are British Citizens. The judge found that he has a genuine and subsisting relationship with his wife and two children. He found it to be in the children's best interests to remain in the UK with all the advantages of education and health care that accrue through being British Citizens. He also found that it is in the best interest of the children to remain in the family unit of both parents.

5. The judge found that the offences of which the appellant was convicted caused serious harm and that his deportation is conducive to the public good. He is thus a foreign criminal, as defined in s117D(2)(c).

6. The judge concluded

> …because the immigration history of A is so bad and he has committed two serious criminal offences that, although C1-2 [the two children] may be caused some short-term hardship in adjusting to life in Pakistan, none the less their best interest in staying in the UK to enjoy the benefits of life here are outweighed by the public interest in maintaining effective immigration control, preventing and deterring crime and protecting the economic interests of the UK. In addition, I conclude that the children would not be caused undue hardship by living in Pakistan with A or living in the UK without him. I consider there is inadequate evidence to establish that the children would be caused long lasting psychological damage by living in Pakistan or living in the UK without A.

Error of law

7. The decision sets out numerous quotes from case law. Interspersed in those quotes are findings but the general impression is of an unstructured decision with little in the way of reasoned analysis

8. There grounds seeking permission to appeal can be identified under 5 heads although there is inevitably an overlap between them (other than the 'mistaken identity which I have dealt with above).

   Ground 1: *It is submitted that the judge erred in law in finding the appellant had not been trafficked to the UK as he claimed.*

9. There has been no Competent Authority decision on his claim to have been trafficked and the respondent in the reasons for decision letter does not refer to the trafficking claim. The appellant raised this issue in his grounds of appeal to the First-tier Tribunal and very clearly in his witness statement and it does not appear that he was cross examined on this issue. It is not clear to what extent this was pursued before the First-tier Tribunal or to what extent this formed a significant part of his claim and whether it was an issue that was or should be treated by the respondent as an asylum claim. There was no background evidence about trafficking in Pakistan and risks associated with that submitted to the First-tier Tribunal. It is of course for the appellant to prove his case. But in the absence of any cross examination by the presenting officer and no questions being raised by the judge, there appear to be no reasons given by the judge why his account has been disbelieved. A mere statement of disbelief is insufficient. The First-tier Tribunal judge erred in law in reaching that finding without providing reasons.

   Ground 2: It is submitted the judge erred in failing to carefully consider the report by the Independent Social Worker and in particular failed to factor in the views of the social worker.

10. The judge has not recorded the social worker's views that the appellant is the primary carer for the two children, that there is no evidence to suggest that he is a risk to children under the age of 16 years; that neither he nor his wife has family to return to in Pakistan. The judge records that the social worker report says he "still forms a medium risk of harm to adult children". It does not. The

judge does not provide any reasons why it would be proportionate for the primary carer of British Citizen children to be removed from the UK and the consequences to them of losing their primary carer if they were to remain in the UK. Although the judge records that it would not be unduly harsh for the children to remain in the UK without the appellant or to travel to Pakistan with him and that there are adequate medical and educational facilities in Pakistan, he provides no reasons why it is not unduly harsh for the children to be deprived of access to such services as British Citizens given that the evidence was that he was the primary carer. The judge finds that the children's mother can remain in the UK to look after the children, yet does not make findings on this in the context of them losing their primary carer or the consequences of them being looked after by someone who is not their primary carer.

Ground 3: *it is submitted that the judge erred in law in finding that he did not accept that the appellant's wife's family wished her harm or would be able to track her down.*

11. The evidence was that the appellant's wife had obtained her indefinite leave to remain because of domestic violence at the hands of her former spouse; that was accepted by the respondent. Her evidence was that she had been disowned by her family following her divorce from her former husband because she was accused of bringing shame upon her family. Her witness statement refers to her fear that her family will find her and kill her. The record of proceedings does not record any significant questioning of that assertion but I also note that there was no significant background material submitted in connection with so-called "honour killing" or the availability of protection by the authorities. There does not appear to have been any evidence to contradict the wife's evidence that she had been disowned or was perceived to have brought shame upon her family. Although it may be that her family would not be able to 'track her down' and that finding may have been justified given the lack of evidence filed on her behalf to substantiate such a claim, there were no reasons provided for the finding that her family would not wish her harm. No finding was made on whether the wife's family had disowned her and the possible consequnces of that

Ground 4: it is submitted that the judge erred in law finding the children would have family in Pakistan when the wife's evidence was that she had been disowned by her family when she divorced her former husband and the husband's evidence was that he had been trafficked and had no family.

12. The wife's witness statement refers to the violence she sustained and that she was disowned by her family because of the divorce and the reasons for that. The presenting officer did not cross examine her on that element of her evidence. The judge asked a few questions about where her family lived. His finding, in the absence of evidence to the contrary and any relevant cross examination and in the absence of any reasoning that the children would have family in Pakistan, is perverse.

Ground 5: *the judge erred in referring to the wife's evidence that the family was reliant on public funds.*

13. The evidence was that the wife had been working full time prior to the birth of the most recent child and was currently receiving public funds. She is a British Citizen and the children are British Citizens. They are entitled to those funds and tax credits. Her evidence was that she would return to work albeit not full time. It was accepted the appellant had been working previously, albeit illegally. The judge's finding that the appellant would be unable to be maintained economically in the UK was unreasoned, and perverse, in the light of that fact that he had previously worked.

Conclusion

14. Drawing all these matters together I am satisfied that the judge has erred in making perverse findings on some maters as set out above and failing to give adequate reasons for others.

15. I set aside the decision to be remade.

16. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. In this case findings of fact are required to enable a proper and full decision to be made. I conclude that the decision should be remitted to a First-tier Tribunal judge to determine the appeal.

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit it to the First-tier Tribunal to be remade, no findings preserved save that there is a genuine and subsisting relationship between the appellant and his wife and children.

Date 25th January 2018

Upper Tribunal Judge Coker