



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03743/2016

THE IMMIGRATION ACTS

Heard at Field House
On 16th April 2018

Decision & Reasons Promulgated
On 03rd May 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

H I N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, instructed by Rivington Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1989. She appeals against the decision of First-tier Tribunal Judge M A Khan dismissing her appeal against the refusal of her protection claim under the Immigration Rules and on human rights grounds.

The Appellant's Immigration History

2. The Appellant entered the UK on 16 December 2009 as a student. She was granted further leave to remain as a student until June 2013. In December 2012, the Appellant submitted an application for leave to remain as a Tier 1 (Entrepreneur) Migrant,

which was refused on 18 June 2015 on the basis that she had submitted false documents. She did not appeal the refusal and on 8 October 2015 made a claim for asylum. Her claim was refused on 19 March 2016 and she appealed to the First-tier Tribunal.

3. The Appellant's asylum appeal was dismissed by First-tier Tribunal Judge Sweet on 7 October 2016. She appealed to the Upper Tribunal who found an error of law in that the judge failed to make firm findings of fact whilst appearing to accept the account given by the Appellant as true and accurate. Upper Tribunal Judge Clive Lane found that the judge's analysis was inadequate, primarily because he failed to make clear findings of fact regarding the state of the relationship between the Appellant and her father and the likelihood of the father assisting the Appellant upon return to Bangladesh. The decision of Judge Sweet was set aside and the appeal remitted to the First-tier Tribunal. Upper Tribunal Judge Lane stated that the First-tier Tribunal would need to concentrate only upon the risk to the Appellant on return to Bangladesh with two children born out of wedlock. He set aside such findings as the judge made on that issue and directed that the First-tier Tribunal make clear, unequivocal findings of fact as regards:-
 - (i) The likelihood of the Appellant's unmarried status coming to light;
 - (ii) If it does come to light, whether she will face real risk of ill treatment;
 - (iii) Whether she is likely to enjoy the support of her father or others in Bangladesh and the extent to which such support will mitigate any risk;
 - (iv) The extent to which the Appellant may be able to overcome any potential difficulties in Bangladesh because she is well educated and has employment skills.
4. The matter came before First-tier Tribunal Judge M A Khan. There was an application for an adjournment because at the beginning of the hearing Counsel for the Appellant withdrew from the proceedings. The Appellant sought an adjournment in order to be able to instruct another legal representative. The judge refused the application for an adjournment and proceeded with the appeal.
5. The judge found that the Appellant was not a credible witness for the following reasons. She came from a very strict Muslim family in Bangladesh and until she came to the UK, at the age of about 20, she had been educated, trained and practised the strict Islamic culture herself. She still dressed in traditional Bangladeshi dress and kept her head covered. The Appellant said in evidence that she was taught from childhood onwards that to have a relationship outside marriage and have sex was an absolute sin. The judge did not find it credible or consistent that, approximately two years after her arrival in the UK, she would have entered into a relationship outside marriage.
6. The Appellant stated that she continued to live with the father of her children in an unmarried relationship until June 2015 when her application was refused. She said to him that they should get married and return to Bangladesh. He said he was not returning to Bangladesh and walked out of the house, abandoning her and their two children. The judge did not accept the Appellant's evidence that her partner would

have walked out in such a manner. The culture, religious background and, in particular, the Appellant's upbringing led him to believe that the Appellant would not have lived with her partner without entering into a religious marriage and she would not have given birth in the circumstances stated by her.

7. The Appellant made her asylum claim after her Tier 1 application had been refused for submitting false documents. She claimed to have been living with her partner since 2011 and had given birth to their two children. She claimed that her father stopped financially supporting her in 2011. The judge concluded that, if this was the case, then the Appellant should have at least made her asylum claim in 2011. He found that she delayed her claim until October 2016 and Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applied.
8. Permission to appeal was sought on the grounds that the decision to refuse the adjournment was unfair because the Appellant was not prepared to represent herself and had been severely prejudiced by circumstances not of her own making. The judge erred in relying on Section 8 of the 2004 Act and the Appellant's delay in claiming asylum. The Appellant was unrepresented at the hearing and the judge's findings on credibility were based on answers in cross-examination. There was no discrepancy in the Appellant's evidence and, had the Appellant been represented, any potential discrepancies could have been cleared up in re-examination. The judge took into account irrelevant considerations in assessing credibility.
9. Permission to appeal was granted by Upper Tribunal Judge Gill on 25 January 2018. She states: "It is arguable that Judge of the First-tier Tribunal M A Khan's refusal to adjourn the hearing has led to the Appellant's hearing being unfair, given that Counsel for the Appellant, who plainly attended to represent her on the day, withdrew from the case. Grounds 3 and 4 are also arguable. Although ground 2 is weak, I will not refuse permission on ground 2 in the particular circumstances of this case. It may be that any error (if made) in relation to the s.8 of the 2004 Act may be material when taken with other errors (if made)."
10. Upper Tribunal Judge Gill gave the following directions: "If the Appellant intends to rely upon the explanations given in ground 1 as to the circumstances that led to Counsel withdrawing from the case, she must comply with the following directions:
 1. She must produce a witness statement explaining the circumstances that led to Counsel withdrawing from the case.
 2. She must confirm to Counsel that she waives her privilege to the extent necessary for Counsel to comment on her witness statement. She must provide Counsel with a copy of her witness statement referred to in 1. above.
 3. No later than 10 days before the hearing date, she must file and serve copies of any and all communication between herself and [Counsel] on the subject, together with a copy of her witness statement.

If the Appellant fails to comply with the above Directions, she will be precluded from relying upon the assertions in ground 1 as to the reasons why Counsel withdrew from the case.”

11. In response to directions the Appellant submitted a signed witness statement dated 3 April 2018 stating:

- “1) I am the Appellant in the above mention appeal and my appeal was listed for hearing on 15 May 2017. I was represented by the solicitors Messer Taj Solicitors.
- 2) My solicitors arrange the counsel Ms AN to represent me at the hearing. They forward all the documents and give briefing to her. I confirm that I never met her before the hearing date.
- 3) On the date of hearing, counsel Ms AN had conference with me before going to hearing room. There was no interpreter present. Ms N do not speak Bengali (Sylheti).
- 4) My friend Brother Mr AR was accompanying me at the hearing. My children were comfortably sitting with Mr AR and Ms N asked me if AR is MU? Mr AR offered to show his driving licence to Ms N but Ms N had her doubts.
- 5) Ms N informed me that she would not represent me and accordingly she informed the judiciary.
- 6) As a result, I have to do personally represent my case. I was not prepared so to be self-represent which is different to a litigant in person, who knew they are going to represent themselves and can prepare accordingly. Hence, I file permission to appeal to Upper Tribunal on the ground of fairness, which is now granted. A copy of the permission decision is enclosed herewith.”

12. There was also a statement of 9 April 2018 which states: “I H I N of ... hereby confirm that I waive my legal profession privilege to the extent necessary for you to comment on my enclosed Witness Statement dated 03rd April 2018.”

13. The Appellant submitted a witness statement from Counsel, signed and dated 12 April 2018, which states:

- “4. I was instructed by Taj Solicitors to represent Ms N at her appeal hearing on 15 May 2017. The events of that day are still very clear in my mind because they were so unusual.
5. I do not agree with Ms N’s account in her witness statement of the circumstances that led me to withdraw from the proceedings on 15 May 2017. I strongly refute any suggestion, either express or implied, that my

conduct was improper. I made a detailed contemporaneous note of what happened that day and e-mailed an attendance note to Taj Solicitors on 16 May 2017. I attach a copy of that attendance note (a privileged document). I have edited it slightly for relevance. This makes clear that during a pre-hearing conference, Ms N confirmed that she is married, that her husband was waiting outside in the car and that her solicitor had 'made' the case. She refused to answer my detailed questions and insisted I speak to her solicitors.

6. The issue of a lack of interpreter during the conference is addressed at §9 of the Attendance Note. I do not recall having any difficulty in understanding Ms N when we spoke in English.
 7. I was professionally embarrassed at court for the reasons set out in my attendance note and was therefore obliged to return my instructions, pursuant to the Bar Code of Conduct. I confirm that I take my professional and ethical obligations very seriously and would never abandon a client at court because I 'had [my] doubts', as alleged. In this situation, my professional duties were clear. I had no choice but to withdraw.
 8. I was first contacted by (sic) in regard to this matter by Rivington Solicitors on 5 April 2018 at 18.30. I was not provided with confirmation that Ms N had waived privilege until 16:36 on 9 April 2018. This Response has been produced as soon as possible after that bearing in mind my other professional commitments.
 9. This response is being provided to Ms N's Solicitors and it is up to them whether they provide the Upper Tribunal with the response I have given."
14. In her attendance note, Counsel states that she was notified by the Appellant's solicitors that she would be late arriving at court because there had been an accident. While speaking on the telephone to instructing solicitors Counsel saw the Appellant arriving at court with a man and she asked her instructing solicitors who he was. Her instructing solicitors, Taj Solicitors, stated "That's her husband". Counsel asked what she meant and expressed shock since the case was being run on the basis that the Appellant was a single mother. Counsel had a conference with the Appellant and explained what had happened in the conversation with her instructing solicitors that morning. The Appellant stated that the man who was with her and who was playing with the children was not her husband but was the brother of a friend who had come to court to look after the children. Counsel asked why instructing solicitors would say that the Appellant was coming to court with her husband and the Appellant stated that her husband was waiting in the car. Counsel pressed the Appellant on this point and asked the Appellant why she had stated in her witness statement that she had not seen her partner, MU, the father of her children, since June 2015. The Appellant did not answer and became angry and frustrated. The Appellant stated that the solicitor had made the case and that she did not know what was in the papers. Counsel contacted Taj Solicitors and explained that she was in professional difficulty having explained what had happened. On having a further conversation with the Appellant, she confirmed that her husband is MU and that his status in the UK is as a student. When the matter was called on Counsel withdrew from the case and explained that the Appellant would want the matter to be adjourned so she

could obtain alternative representation. Counsel did not disclose the reason for the withdrawal.

Submissions

15. Mr Eaton submitted that the Appellant attended court expecting to be represented. The circumstances set out in the two witness statements submitted by the Appellant and by Counsel were disputed. The Appellant was not represented at the appeal and her application for an adjournment was refused, such that she was forced to proceed and represent herself through an interpreter. The judge was unaware of the reasons for why the Appellant was unrepresented and it was unfair in the circumstances for him not to grant an adjournment. The matter was not even stood down to enable the Appellant's solicitors to seek further representation.
16. In refusing the adjournment the judge stated at paragraphs 9 and 10:
 - “9. After Counsel had withdrawn from the case, the Appellant said that she needed to be represented and wished to have more time to instruct another legal representative. Mr C for the Respondent opposed the Appellant's request for an adjournment. Mr C submits that it is not known if the Appellant's solicitors are able to continue to act for her and this case was listed for a re-hearing in March 2017, I should proceed with the appeal.
 10. Having heard both the Appellant and Mr C for the Respondent, I informed the Appellant that I was refusing her request for an adjournment on the basis that it is in the interest of justice and fairness to proceed with the hearing. I further informed the Appellant that I will be only dealing with part of her asylum claim which deals with her claimed unmarried woman having two children outside weddlock (sic), not with her father's BNP involvement.”
17. Mr Eaton submitted that the reasons for refusing the adjournment were cursory and it was clearly not in the interests of justice to proceed with the appeal. Given that it was a complicated asylum appeal, it was not appropriate to proceed whilst the Appellant was unrepresented. There was no interpreter provided by the Appellant's instructing solicitors in order to enable her to communicate with Counsel prior to the hearing in conference. The Appellant had always given her evidence via an interpreter and the conversation with Counsel was not in the Appellant's first language. The standard of English in order to make a Tier 1 application was not proficient, such that the Appellant could easily be understood. Although Counsel, AN, thought she understood the Appellant in English, this did not mean that the Appellant was able to communicate effectively.
18. It was very unusual that the Appellant had said she did not know what was in the papers given that she had given evidence on two previous occasions when the appeal was previously heard. The witness statements would obviously form part of

the Respondent's case if the matter was reheard. Mr Eaton submitted that it should be remitted back to the First-tier Tribunal on the basis that the judge had acted unfairly in failing to grant an adjournment.

19. Further, the judge failed to consider any of the written evidence. His findings at paragraph 41 were based on cross-examination and there was no opportunity for re-examination given that the Appellant was not represented. The judge basically decided at paragraph 41(a) that he did not believe a strict Muslim would have a child outside wedlock and he did not believe the Appellant's husband would have left her because she wanted to get married.
20. There was also a misdirection in relation to Section 8. The delay in claiming asylum amounted to six weeks and this matter was dealt with in the asylum interview at paragraph 101. Similarly, the Appellant had not spoken to her mother since childhood because her parents were separated when she was 10 years old. There was no inconsistency in the evidence about contact with her father, and in any event, any potential discrepancy could have been explained in re-examination. The Appellant was well aware that her husband had made a student application.
21. Mr Eaton submitted that the judge's credibility findings were spurious and based on plausibility with a selected view of the facts. There was no reference to the interview which dealt with the points relied upon by the judge. Paragraph 276ADE applied. There were very significant obstacles to re-integration and the judge failed to consider this.
22. Ms Pal submitted that Counsel's statement would be relied on by the Respondent. She conceded that it the judge had failed to make adequate findings of fact. Ms Pal agreed that there had been procedural unfairness in failing to adjourn the appeal and that the matter should be remitted.

Discussion and Conclusions

23. On the particular facts of this case and the late withdrawal of Counsel from representing the Appellant, I find that the refusal of the adjournment was unfair. The Appellant has been represented throughout the proceedings. She had attended the First-tier Tribunal on a previous occasion and given evidence. The matter was remitted for rehearing on a specific basis that she was a single mother returning to Bangladesh with two illegitimate children. The judge was given specific directions as to the issues he should consider on the appeal by Upper Tribunal Judge Lane. It is clear that these issues were complex in nature and it would not be appropriate for the Appellant to be unrepresented. She was obviously not aware that Counsel would withdraw from the case prior to the hearing and, in all the circumstances, the refusal of the adjournment was unfair.
24. The Appellant appreciates the contents of the witness statements will be relied upon by the Respondent at any rehearing of the appeal, and notwithstanding the content of those statements, I am still of the view that the refusal of the adjournment was

unfair because the Appellant was left unrepresented at very late notice. The Appellant has waived privilege and has submitted her witness statement and Counsel's witness statement exhibiting the attendance note. It will be a matter for the First-tier Tribunal Judge to deal with any dispute arising from those two witness statements and to assess the Appellant's claim.

25. I find that First-tier Tribunal Judge Khan acted unfairly in refusing the adjournment and therefore there was procedural impropriety in the conduct of the appeal, such that there is an error of law. I set aside the decision of First-tier Tribunal Judge Khan dated 21 July 2017 and I direct that the matter be remitted to the First-tier Tribunal to be heard by a judge other than First-tier Tribunal Judge Khan.
26. The First-tier Tribunal is directed to deal with the following points:-
- (1) Whether the Appellant is married and if not whether she would face a real risk of ill treatment.
 - (2) Whether she is likely to enjoy the support of her father or others in Bangladesh and the extent to which such support may mitigate any risk, and the extent to which the Appellant may be able to overcome any potential difficulties in Bangladesh because she is well-educated and has employment skills.

Notice of Decision

27. The decision of First-tier Tribunal Judge Khan dated 21 July 2017 is set aside in accordance with paragraph 7.2 of the Practice Directions of 25 September 2012. None of the judge's findings are preserved. The matter is remitted to the First-tier Tribunal for rehearing. The issue is whether the Appellant would be returning to Bangladesh as an unmarried mother of two children and whether she would be at risk of return.
28. The Appellant to file and serve any further evidence upon which she intends to rely fourteen days before the hearing. A Bengali Sylheti interpreter is requested. Time estimate: two hours.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

J Frances

Upper Tribunal Judge Frances

Date: 27 April 2018