



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/06221/2018

THE IMMIGRATION ACTS

Heard at Field House

On 3 October 2018

Decision & Reasons

Promulgated

On 17 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MRS P M
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss J Elliott-Kelly, counsel instructed by Rashid & Rashid solicitors

For the Respondent: Ms Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India born on 12 June 1975. She made a number of family visits to the UK and on 16 September 2014 she arrived with her young daughter, whom she left here to reside with the Appellant's sister. On 28 January 2017, the Appellant last entered the UK when she was detained for failing to declare a change in circumstances and making a false declaration and she claimed asylum on 1 February 2017. This application was refused on 9 April 2018 and the Appellant appealed to the

First-tier Tribunal. Her appeal came before Judge of the First-tier Tribunal Baldwin for hearing on 15 June 2018.

2. The Appellant gave evidence along with her sister EM, her mother JM and Kate Allen, a project worker with Family Action. In a decision and reasons promulgated on 29 June 2018, the judge dismissed the appeal rejecting the credibility of the Appellant's asylum claim and finding that in relation to Article 8 that it would not be disproportionate or unreasonable to expect the Appellant and her dependant daughter to return to India.
3. Permission to appeal was sought in time on the basis that the judge had erred materially in law:
 - (i) In failing to engage with or make findings on the evidence of the Appellant's sister and mother. It was asserted in the grounds of appeal that these witnesses gave oral evidence corroborating the Appellant's claim that her former partner had continued to threaten and harass her after the breakdown of their relationship and this is clear from their witness statements. It was submitted that despite hearing this evidence and having the opportunity to assess it when tested under cross-examination the judge failed to engage with the evidence or make any findings in respect of it when conducting his evaluation of the Appellant's credibility at [24] to [27].
 - (ii) Secondly, it was asserted that the judge had failed to engage with or take proper account of material evidence about what is in the Appellant's daughter's best interests. The judge considered best interests at [28] and [29] but in so doing, failed to take account of the evidence of professionals who had been involved in D's welfare, in circumstances where it is clear that she has been profoundly affected by the domestic violence she witnessed and was subjected to by her father whilst in India. The evidence included the oral evidence and witness statement of Kate Allen, a project worker with Family Action and letters from D's schools and Place2Be a national charity working in schools to support children experiencing emotional difficulties. It was asserted that the evidence goes to the heart of the impact on D in terms of her wellbeing and emotional health if returned to India and thus it was incumbent upon the judge to assess it as part of the best interests assessment.
4. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth in a decision dated 10 August 2018 on the basis

"It is arguable that the judge has not dealt with the question of receiving or rejecting the evidence of the Appellant's mother and sister before reaching conclusions in the case. It is arguable that the judge has not dealt with the full scope of the available evidence in assessing the best interests of D in applying Section 55."

Hearing

5. At the hearing before me Miss Elliott-Kelly, on behalf of the Appellant, sought to rely on the skeleton argument dated 3 October 2018 in support of the contention the judge had made material errors of law.
6. She submitted that there was no doubt the evidence was before the judge in respect of ground 1 because it is summarised at [17] to [19] of the decision. However, she submitted that a summary is not an assessment and it cannot be denied that in findings at paragraph [24] onwards there is no reference to the evidence of the Appellant's mother and sister. She submitted there were three general errors in the failure to engage with that evidence:
 - (i) the failure to give reasons, in that it is unknown if the judge found the evidence to be unreliable or implausible or lacking in credibility or whether he just forgot that he had heard it;
 - (ii) it is irrational in as it fails to take account of material considerations; and
 - (iii) there is a failure to give anxious scrutiny to the Appellant's case.
7. Miss Elliott-Kelly submitted the judge should have assessed what weight should be attached to this evidence and provided reasons for his finding. She submitted that it would not be sufficient to rely on the other reasons given by the judge in respect of the other evidence before him e.g. at [26] and [27] that the Appellant has returned to her home area and even if the judge would have come to the same conclusions had he considered that evidence, the fact that he came to adverse findings means that the principles identified apply with even greater force because there was evidence which may have counteracted or overridden the evidence he did in fact use as a basis for his determination.
8. She submitted that the judge's erroneous approach means that the Appellant has not had a fair hearing of her appeal and the decision should be set aside on that basis alone without having regard of what the evidence goes to.
9. She prayed in aid the former presidential decision in MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC) and in the alternative submitted that the key part of the Appellant's case was that she and her daughter continued to be at risk from her ex-husband; that he has significant contacts within the Indian authorities and that they would not be safe anywhere in India.
10. The evidence of the Appellant's mother and sister corroborate the Appellant's account that there have been ongoing threats and one very serious incident of violence and the evidence of the Appellant's sister corroborates a failure on the part of the police to act, which it is the Appellant's case is attributable to the influence her ex-husband has with the police. She submitted that this evidence has a bearing not only on credibility but also whether there was in fact a sufficiency of protection in the Appellant's home area and an area to which she could safely relocate.

11. In respect of the second ground of appeal, Miss Elliott-Kelly submitted with reference to [28] and [29] of the judge's decision that there was no reference at all by the judge to the fact that D's project worker Ms Allen attended to give evidence and be cross-examined as to D's extreme fear and anxiety as to the prospect of return to India. The evidence from D's school confirms concerns about her emotional wellbeing and the fact that she has received one-to-one counselling as a result.
12. Whilst ultimately it may be that the judge would have decided that it was in D's best interest to return to India or remain in the UK but that was cumulatively outweighed by the public interest considerations, however, there was simply no proper assessment of this aspect of D's best interests at all which rendered his conclusions on this part of the appeal unsafe and unsustainable.
13. In her submissions, Ms Willocks-Briscoe submitted that with regard to the issue of the evidence of the Appellant's sister, there was no indication in the grounds of appeal as to exactly what evidence the judge should have taken into account. She accepted, however, that the judge does not make any direct reference to the evidence of the Appellant's sister and mother in his findings.
14. She submitted that it is necessary to start from the position that the Respondent accepted that the Appellant had been subjected to domestic violence and the issue is the risk of future domestic violence. Ms Willocks-Briscoe submitted that neither the mother or sister's statements deal with the issue of the risk of domestic violence post-separation and it was necessary to look at the background evidence which the judge had done and had tackled head on, dealing with the lack of police engagement at [26]; the fact the Appellant was able to work and at [27] that the Appellant has employed an advocate to represent her in the custody case. The judge looked at the Appellant's circumstances, including the fact that she is bilingual, able to work and has access to funds and her ability to obtain employment. He found that her former partner would not be able to relocate outside of her home area and that this was not an issue that had been addressed by the evidence of the Appellant's mother and sister. She submitted that, even if there was an error not to address the witness evidence, it was not material.
15. In respect of the second ground of appeal Ms Willocks-Briscoe submitted that the judge had looked properly at this issue. Whilst she accepted he had not referred to Ms Kate Allen by name, he was properly appraised of the issues, noting that the Appellant's daughter has had the benefit of lengthy counselling sessions and has adjusted with the move to a foreign country. He concluded, notwithstanding new factors, that it will be in her best interests to live with her mother and it would not be unjustifiably harsh, disproportionate or unreasonable in all the circumstances for D to return to India with her mother. She submitted that his findings were ones that were reasonably open to him, they were not perverse and were adequately reasoned on the evidence before the Tribunal.

16. In reply, Ms Elliott-Kelly submitted in respect of the first ground of appeal, that this was not simply a matter of pedantry or a failure to refer to evidence by name but rather it was a material error as it went to the fairness of the proceedings and decision. In terms of what the evidence goes to, it is not correct that the evidence of the Appellant's mother and sister simply corroborated past abuse. The relationship between the Appellant and her husband broke down in 2012 which is when the Appellant left the house she had been living in and moved to her mother's house. The issue is whether the abuse and threats continued and whether the abuser could find the Appellant and her daughter if they internally relocated.
17. The evidence of the Appellant's sister corroborates that there was a violent incident post separation (see [18] of the decision and her witness statement). There was clearly an ongoing series of threats and violence which the judge simply has not taken into account when making his findings. At [26] the judge erred materially in fact where he finds "*following its breakdown it is not suggested he has at any time used violence on the Appellant*". It is not the case, as the Presenting Officer suggests, that this turns solely on objective evidence, in that it was open to the judge to find that the past condoning of his actions by the police towards the Appellant's former husband indicated the kind of influence rendering internal flight unavailable. The general background evidence referred to speaks only of the general position and does not take into account the potentially material consideration i.e. the degree of influence that the abuser might have.
18. She further submitted that, whilst Ms Willocks-Briscoe attempted to assess the evidence on behalf of the Respondent, this did not substitute for an assessment by a judge which was clearly lacking. The same point can be made in respect of the evidence of Ms Allen in respect of D. It is axiomatic that a judge must consider all the evidence as part of the best interests assessment. Ms Allen was tended for cross-examination and her evidence is contrary to the judge's finding at [28] that D is well adjusted and has coped with a move to a foreign country.

My Findings

19. I find material errors of law in the decision of First-tier Tribunal Judge Baldwin, essentially for the reasons set out in the grounds of appeal and expanded upon by Miss Elliott-Kelly in her skeleton argument of 3 October 2018 and her oral submissions. I accept the failure by the judge to engage with the evidence of any of the witnesses other than the Appellant does undermine the safety of his findings and the fairness of the hearing, such that none of his findings can stand and the decision is rendered unsafe and unsustainable.
20. It is the case, as Miss Elliott-Kelly submits, that the evidence of the Appellant's mother and sister does go to the continued threats and violence against the Appellant by her former husband after they

separated. This continuation is clearly a material consideration in respect of the assessment of the risk of persecution by her former husband if the Appellant and her daughter returned to India.

21. I find the failure to engage with and assess the evidence not only of Ms Allen, most importantly, who attended the Tribunal in order to give evidence on behalf of the Appellant's daughter, D, but also the letters from her school and Place2Be do undermine the safety of the judge's findings as to D's best interests. It would appear from the judge's conclusions that he took a very positive view of the impact on D as a consequence of receiving education and counselling in the UK. When he found at [29]:

"D who has proved herself capable of adjusting not only to a change of schools twice but also adjusting to a new culture, country and an extended period of having had neither parent caring for her."

And at [28]

"She has had the benefit of a lengthy course of counselling sessions and there are no serious concerns about the mental or physical health of her or her mother. D is well adjusted and has coped with the move to a foreign country, separation from her mother and two changes of school since she left India."

22. I find those findings are rendered unsafe in light of the evidence that in fact although D has now flourished since the start of secondary school, there is clearly an amount of emotional distress which caused her to be withdrawn and that she suffers from anxiety and distress about the family situation and the fear of being forced to return to India. This is reflected for example in the letter from Place2Be dated 31 January 2017, the letter from Kate Allen in respect of the Young Carers Homework Club at D10 of the Respondent's bundle and the assessment at her primary school that she can still sometimes be withdrawn and needs ongoing support.
23. For the reasons set out above I set aside the decision of First-tier Tribunal Judge Baldwin and remit the appeal for a hearing *de novo* before a different judge of the First-tier Tribunal.

Notice of Decision

The appeal is allowed with the effect that the appeal is remitted for a hearing *de novo* before the First tier Tribunal.

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 him or any member of their 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 Rebecca Chapman

Date 11 October 2018

Deputy Upper Tribunal Judge Chapman