Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06433/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th January 2018	**On 6th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[S K]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs C Charlton (LR)
For the Respondent: Mr N Bramble (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Geraint Jones QC, promulgated on 21st August 2017, following a hearing at Hatton Cross on 3rd August 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me

The Appellant

2. The Appellant is a female, born on [ ] 1985, and claims to be a citizen of Afghanistan. She appealed against the decision of the Respondent Secretary of State dated 21st June 2017, refusing her application for asylum and the grant of humanitarian protection under paragraph 339C of HC 395.

3. The basis of the Appellant's claim is that she is an Afghan Sikh who fears mistreatment in Afghanistan on account of her religion. Some six years ago, her father was shot and killed while he was working at a shop in Kabul. The Appellant after the murder, reported it to the police but no action was taken, and she then went and lived in a gurdwara (a Sikh temple), and she was not allowed as single woman to live in the city of Kabul. The gurdwara committee members eventually arranged for her to leave Afghanistan. An attempt was first made to have her leave through India, as an Indian national with an Indian passport, when that failed, she returned back to Afghanistan, and then made her way out again to the west, arriving in the UK, where she married another Afghan national, a Sikh by the name of [NS], who has indefinite leave to remain, and they have two children, both of whom are British citizens. Their current ages of the eldest is going to be 3 years of age in April 2018, and the youngest, a son, will be 1 year of age in April 2018. The Appellant fears that if she were to return to Afghanistan she will be harmed on account of her religion, as a Sikh.

The Judge's Findings

4. The judge began the determination by observing that, "the Appellant was gloriously vague and claimed not to know much, if anything, about those travels" (paragraph 3) when asked how she travelled with an agent, some three and a half years ago, through an unknown country, before coming to the UK, given that the travel took some four months. The Appellant's account, during these travels was that she sometimes travelled in a lorry, sometimes by foot, and sometimes by air (paragraph 11). The judge was not impressed by the fact that the Appellant claimed not to know anything about the country to which she went for four months before returning to Kabul. The judge stated that, "I find as a fact that she was in India, where, being a Punjabi speaker, she would have been able to communicate easily with those around her ..." (paragraph 21(iv). The judge was also secondly, not impressed by the fact that the Appellant had an Indian passport when she made her visa application in 2012, after her fingerprints had been taken, because this appeared to suggest that she was an Indian citizen, and not a citizen of Afghanistan, as she had maintained all along. In conclusion, the judge held that the Appellant could return to India, with her children, and with her husband. In ending, the judge held that, "so far as the children are concerned, they will enjoy Indian citizenship and will be free to reside in that country with their mother" (paragraph 26).

Grounds of Application

5. The grounds of application state that the judge failed to give reasons for why he disbelieved the Appellant's narrative. The reasons given for rejecting the narrative were not properly explained. He had accepted the evidence of the Respondent without hesitation despite evidence to the contrary from the Appellant. The conclusion by the judge that the Appellant "is somebody of guile" was unsustainable, when that expression was used to criticise the Appellant for her statement that she had an Indian passport which was given to her by her agent. The grounds state that the judge failed to engage with the cultural aspect of the appeal, with respect to a lone Afghan woman, who had always lived in a Sikh gurdwara in Kabul, and was dependent upon others.

6. On 13th November 2017, permission to appeal was given by the First-tier Tribunal on the basis only that the judge failed to make findings as to what was in the best interests of the children and failed also to properly deal with the Article 8 ECHR aspect of the case, which had been specifically argued in the grounds of application.

7. A Rule 24 response dated 8th December 2017 is to the effect that the judge had directed himself appropriately and good reasons had been given. The judge had noted that no case was put forward by the Appellant under Article 8 before the Tribunal. The Appellant was at liberty to present their case differently to that put forward in the Grounds of Appeal. The determination shows that Article 8 was not pursued before the judge (see the determination at paragraphs 24 to 28) and an error cannot therefore be established on the part of the judge. Secondly, even if there was an error to deal with the issue of Section 55 and/or Article 8 outside of the Rules, it was submitted that given that there was no evidence before the judge to suggest a remotely arguable case under Article 8, there was no materiality to the error.

Submissions

8. At the hearing before me on 12th January 2018, Mrs Charlton, appearing on behalf of the Appellant relied upon her grounds of application.

9. First, she submitted that the Appellant had never denied that she had been given a fraudulent Indian passport by her agent so that she could leave Afghanistan and go to India and from there come to the UK. It was wrong to describe this as the actions of "somebody of guile". The fact, however, was that the Appellant was stopped then by the Indian authorities from leaving the country on the basis of a UK endorsed visa in her passport, because the passport was deemed to have been a forgery. The EURODAC fingerprints were not produced. The judge was wrong, on the basis of this narrative, to simply conclude that the Appellant was an Indian, when all along she had maintained that she was not an Indian, and it had been recorded at the outset (at paragraph 1) by the judge, that the Appellant spoke Punjabi, Dari and Kabli, a distinct dialect spoken in Kabul

itself only by Sikh Kabul dwellers. Mrs Charlton submitted that Sikhs in India will not be speaking Kabli or Dari.

10. Second, the Appellant's husband gave evidence at the hearing, and he made it quite clear that he himself was also an Afghan Sikh, and would not ever consider marrying a woman who was not also an Afghan Sikh, because of the cultural differences that exist between people from different countries. They had, after all, married quickly after the Appellant's arrival to the United Kingdom, because of their similar background. None of this features in the determination at all.

11. Third, Article 8 was set out in the original grounds. The judge was wrong now to say that, "I record that no argument was advanced before me based upon Article 8 ECHR ..." (paragraph 28).

12. Fourth, the approach of the judge was further tainted by the observation, in relation to children who held a British citizenship, that, "they will enjoy Indian citizenship and will be free to reside in that country with their mother" (paragraph 26). There is absolutely no analysis here, submitted Mrs Charlton, of the "best interests" of the children, but for the glib assertion that they can enjoy Indian citizenship, when all along, it is plain that they are British citizens.

13. For his part, Mr Bramble submitted that he will simply rely upon the Rule 24 response.

14. In reply, Mrs Charlton submitted that the appeal should be remitted back *de novo* to the First-tier Tribunal, to be determined by a judge other than Judge Jones QC because there was no proper analysis of the best interests of the children and the Article 8 issue was not considered, when it plainly ought to have been, given that the Appellant was married to a person who had indefinite leave to remain in the United Kingdom, and was settled in this country.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

16. First, there is the question of the Appellant's citizenship. She had consistently maintained that she was an Afghan national who had procured a false Indian passport through her agent. The Appellant, in confirming possession of her Indian passport, was not responding to the EURODAC print match, which had only been produced on the day of the hearing, but had already declared the position before them. Furthermore, in relation to her citizenship, the evidence of her husband, at the hearing that he was an Afghan national who would only have married an Afghan Sikh woman, was not even referred to by the judge.

17. Second, the judge does not address the position of the two British citizen children on the basis of their "best interests" under Section 55 of the BCIA 2009. Nor is this clearer in the statement that "they will enjoy Indian citizenship and will be free to reside in that country with their mother" (paragraph 26), which is difficult to understand if they already hold British citizenship.

18. Third, Article 8 ECHR was asserted in the Grounds of Appeal. It is stated there that the Appellant's removal will be contrary to Article 8 ECHR because

> "The Appellant is in a relationship and has undergone a religious wedding with an individual person and settled in the UK. Further, the couple have two children together, both British citizens, whose best interests will be served by remaining in the UK as a family unit" (paragraph 7 of the grounds).

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Geraint Jones QC under Practice Statement 7.2(a). This appeal is allowed to that extent.

This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th February 2018