



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/09032/2017**

Appeal Numbers:

PA/09034/2017

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 13 February 2018

On 15 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

KN & HA

[ANONYMITY DIRECTION MADE]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mrs P Glass, instructed by Emazon Solicitors

For the respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Paul promulgated 2.11.17, dismissing on all grounds their linked appeals against the decisions of the Secretary of State, dated 4.9.17, to refuse their protection claims.
2. Sitting as a First-tier Tribunal Judge I granted permission to appeal on 7.12.17.

3. Thus the matter came before me on 13.2.18 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal as to require that the decision to be set aside and remade by remitting the appeal to the First-tier Tribunal.
5. The protection claim was based on the appellants' same-sex relationship with each other and a fear of persecution on return to Pakistan. They claim to have started their relationship in Pakistan in 2005 but were caught. As a result, they were both tortured and beaten. The appellant KN was burned with a hot iron and his fingers were broken and damaged. They were separated, but each made his way to the UK, where they met up again by chance.
6. The judge found the claim not credible and observed that there was no evidence of any cohabitation, whether in the past or present. The medical evidence was rejected at [26] of the decision, which evidence the judge considered to be based on self-serving statements made to support a false case.
7. In granting permission to appeal, I considered it arguable that the judge erred in law by overlooking the statement within the appellants' bundle of the witness Mr A, and that the treatment of the medical evidence was arguably inadequate.
8. The Rule 24 response, dated 5.1.18, submitted that the findings were open to the judge, including the assessment of the medical evidence. It was also asserted that the absence of reference to Mr A within the decision was not material to the outcome of the appeal.
9. Prior to the listing of the appeal before Judge Paul on 16.10.17, the appellants' representative wrote to the Tribunal to request an adjournment of the appeal to allow the witness Mr A to attend. He was said to be an important witness, who gave evidence supporting the claimed relationship between the two appellants, and was also the appellants' landlord. The application was refused, on the basis that a statement from Mr A would be available to the Tribunal. It is important to note that the adjournment request was not renewed. In those circumstances no error of law is disclosed by the judge proceeding in the absence of the witness.
10. However, the decision omits any reference to the witness Mr A, other than at [25] of the decision, where it was stated, "the fact that the appellants stated that they had a witness who was in Pakistan who could have testified to them living together, in my view, is neither here nor there." The judge appears to have been oblivious to the fact that Mr A's witness

statement was within the appellants' bundle. Whilst the statement of Mr A would have limited weight in his absence from the hearing to give oral evidence, it cannot be given no weight or simply ignored. Further, whilst Mr A was said to be the appellants' friend, he was also their landlord, which gave some weight to his statement to the effect that he knew from first-hand knowledge that the two appellants were in a relationship with each other. It follows that the decision is inaccurate when it is stated at [25] that there was no evidence of cohabitation. This amounts to a serious error of law.

11. I also find the judge's treatment of the medical evidence flawed. Looking at the way in which the first sentence of [26] is worded, it appears that the judge fell into the trap of making findings as to credibility without taking into account the medical evidence alleged to be consistent with the account of torture and beatings in Pakistan, in particular the damage to MN's fingers, and then dismissing the medical evidence as being based on what the judge considered to be self-serving statements made to support a false claim. That is reinforced by the statement which follows, that the causation of the injuries, "remains in doubt so long as the primary account as to their cause is suspect." The medical evidence should have been taken into account along with all the evidence, in the round, before the credibility findings were arrived at, and not addressed separately only after the adverse findings were made.
12. It follows that the decision of the First-tier Tribunal is flawed for multiple errors of law, material to the outcome of the appeal, and cannot stand. It must be set aside and remade.

Remittal

13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal decision vitiate all the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
14. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the directions below.



Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

1. The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross;
2. The appeal is to be decided afresh with no findings of fact preserved;
3. The ELH is 4 hours;
4. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Paul;
5. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
6. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. However, I consider anonymity appropriate.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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. Breach of this direction may lead to proceedings for contempt of court.

Fee Award

Note: this is not part of the determination.

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

A handwritten signature in black ink, appearing to read 'Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup