



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12754/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 17th July 2018

Decision & Reasons Promulgated
On 19th July 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

KB

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L. Mair, Counsel instructed on behalf of the Appellant
For the Respondent: Mr Diwncyz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh.
2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 16th January 2018, dismissed her claim for asylum and on human rights grounds.
3. The Appellant's immigration history and factual background is set out within the determination and in the papers before the Tribunal, namely, the Appellant arrived in the United Kingdom on the 25 September 2010 as a student with leave to remain until January 2012. Her leave was then extended until 2017, however, in 2015 leave was curtailed so that it would expire on 27 December 2015. She applied for leave to remain on the basis of a family and private life which was refused on the 16th of every 2016

and re-considerations of the decision were refused in 2016. On 9 May 2016 the Appellant claimed asylum.

4. The basis of the case was that she faced a real risk of serious harm and return as a member of a particular social group, namely, women at risk of forced marriage and female victims of domestic violence. It was not in dispute that whilst living in the United Kingdom she had been the subject of a serious abuse by a partner which had resulted in criminal proceedings.
5. Her appeal came before the FTT on the 8th January 2018 and in a decision promulgated on the 16th January 2018 her appeal was dismissed.
6. The judge set out her findings and conclusions at paragraphs 10(i)-(xxv). It is plain from reading the findings of fact and assessment of the evidence that the judge did not accept that she would be at risk on return for any of the reasons advanced on her behalf. The judge concluded that she was not satisfied that it had been established to the lower standard that she would face a real risk of persecution or serious harm in Bangladesh. In particular the judge rejected her account of being at risk of a forced marriage. Thus the judge dismissed her appeal.
7. The Appellant sought permission to appeal that decision and permission was granted by First-tier Tribunal Judge Saffer on the 3rd May 2018.
8. Thus the appeal came before the Upper Tribunal. After I had the opportunity of hearing the submissions of both parties and having read and considered the Rule 24 response issued on behalf of the Respondent, I indicated to the parties that I had reached the conclusion that the grounds relied upon by Miss Mair had been made out and that as a consequence I was satisfied that the decision involved the making of an error on a point of law and that the determination should be set aside. Mr Diwncyz conceded that there had been a lack of engagement with the evidence outlined in the grounds and the background evidence and that there had been no compliance with the Presidential Guidance. I now give my reasons for having reached that conclusion, having provided reasons to the advocates at the hearing.
9. The first ground relates to the Appellant's position as a vulnerable witness. In the skeleton argument relied upon by Miss Mair it was identified in the first paragraph that the Appellant was a vulnerable witness and made reference to the Joint Presidential Guidance Note number 2 2010. I note that the advocates had agreed that the presenting officer would not revisit her evidence relating to the conviction and this is set out in the record of proceedings, but it does not appear that the judge considered whether the Appellant was a vulnerable witness or not in the light of the medical evidence that was before the Tribunal and in the light of her previous factual history which culminated in the criminal conviction in respect of her ex-partner. There was detailed evidence within the documentation which confirmed that she was or should be viewed as a vulnerable witness. It is not necessary for me to set out in any detail the evidence but there were letters from xxxx which made reference to the disclosures of abuse made, that she had been referred to MARAC on account of domestic abuse and that she had been provided with ongoing support and counselling to assist with trauma she had experienced (see pages 39 – 149). Whilst there was no psychological

report there was material from the general practitioner at page 150 which made reference to her current medical circumstances.

10. Furthermore it is plain from the submissions made by Miss Mair that she had been treated as a vulnerable witness in the criminal proceedings having provided pre-recorded evidence in accordance with the new procedure under section 28 and it had been established that she required assistance and preparation prior to the hearing.
11. In these circumstances, it was incumbent upon the judge to adopt and apply the approach set out in the Joint Presidential Note. I make reference to the case of *JL (medical reports-credibility) China* [2013] UKUT 00145 (IAC), in particular paragraph 6, which referred to the situation where an Appellant was vulnerable and said that it was of particular importance to see what findings, if any, the judge made about the possible relevance of the Appellant being a vulnerable person to the credibility findings.
12. At paragraph 27 of the decision in *JL* judges are reminded that applying this guidance entails asking whether any of the inconsistencies in the Appellant's account could be explained by her being a vulnerable person.
13. The guidance at 10.3 at page 6, which gives guidance on assessing evidence, and paragraph 14, which says that where there were clear discrepancies in the oral evidence, consideration should be given to the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
14. Paragraph 15 states that the decision should record whether the Tribunal has concluded that the Appellant is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and whether the Tribunal was satisfied whether the Appellant had established his or her case to the relevant standard of proof. It is noted that in asylum appeals weight should be given to objective indications of risk rather than necessarily to a state of mind.
15. The importance of applying the guidance in an appropriate case was emphasised by the Court of Appeal in *AM (Afghanistan)v SSHD* [2017] EWCA Civ 1123. Indeed, the Senior President of Tribunals, Sir Ernest Ryder (with whom Gross and Underhill LJ agreed) said at [30] that a "failure to follow [the guidance] will most likely be a material error of law".
16. At para [21] of that decision (agreeing with the submissions made on behalf of the Appellant in that case), the Senior President dealt with the importance of considering the circumstances of a child or vulnerable witness when assessing their evidence in an asylum claim as follows:

"21. It is submitted on behalf of the Appellant that the agreed basis for allowing the appeal on the merits reflects core principles of asylum law and practice which have particular importance in claims from children and other vulnerable persons namely:

- a. given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';
- b. while an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
- c. the findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;
- d. expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below *and JL (medical reports - credibility) (China) [2013] UKUT 00145 (IAC)*, at [26] to [27]);
- e. an Appellant's account of his or her fears and the assessment of an Appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and
- f. in making asylum decisions, the highest standards of procedural fairness are required."

17. There was no assessment by the judge in this case of whether the Appellant was a vulnerable witness and therefore whether there was any need for procedural safeguards at the hearing other than that noted by the presenting Officer and there is nothing on the face of the determination in respect of these issues.
18. Furthermore, the judge did not have any regard to the Appellant's mental health issues in assessing her credibility or the factual findings made by reference to the material. Although the evidence before the judge was not in the form of an expert report specifically addressing the impact upon the Appellant's evidence of her mental health issues, it did raise relevant issues as to her potential vulnerability which may have been capable of having have some impact on her evidence.
19. The Rule 24 response makes reference to the asserted failure in terms of ground 1 to particularise aspects of the findings which were not sustainable in the light of the failure to treat her as a vulnerable witness. However as Miss Mair submitted the core of her claim related to the issue of forced marriage and the attitude of her father. In the findings of fact at paragraph 10 (vii) the Appellant made a disclosure of physical abuse for the first time. The judge rejected this because she had not mentioned it in a witness statement or in her asylum interview and that she did not find it reasonably likely that the Appellant who was able to give evidence in the Crown Court concerning serious abuse would have failed to have mentioned it in an asylum interview. However I accept the submission made by Miss Mair that in reaching that

conclusion, the judge had not taken into account that she had been treated as a vulnerable witness within the criminal proceedings and that her vulnerability had been taken account of in those proceedings in such a way which had led to her ability to participate in those proceedings and this had not been acknowledged by the judge or taken into account in reaching her finding.

20. An issue that flows from that also relates to the Appellant's ability to avoid a forced marriage. At paragraph 10 (ii) the judge found that her evidence of her ability to refuse a number of suitors arranged by her father from the age of 15 established that he was trying to arrange a marriage rather than this being a forced marriage. However that failed to take into account the circumstances as at the date of the hearing in 2018 when she was in a much weaker psychological position as demonstrated by the material within the bundle.
21. I also accept the submission made that there was other relevant evidence relating to the issue of forced marriage which was potentially corroborative to the Appellant's claim. That evidence related to her brother who it was said was also forced into marriage (pages 10 - 13 and the Appellant's mother (14 - 16). There was also letters from the Appellants friends at pages 259 - 263. In addition there was material in the form of country reports/objective evidence from pages 264 onwards in the Appellant's bundle including an extract from the report of the Home Office fact-finding mission in Bangladesh. There was no analysis of the background material in the context of the factual claim advanced. That was of importance given the material set out in the Respondent's decision letter which accepted the gravity of forced marriage and the judge's finding at 10 (iv) that her father was not a "traditional Hindu" or held "traditional Hindu views about women". It was therefore necessary to consider that evidence in the round and in the light of her vulnerability. I refer to paragraph 15 which states that the decision should record whether the Tribunal has concluded that the Appellant is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and whether the Tribunal was satisfied whether the Appellant had established his or her case to the relevant standard of proof. It is noted that in asylum appeals weight should be given to objective indications of risk rather than necessarily to a state of mind and this would include an analysis of the country materials.
22. For the reasons that I have set out above I am satisfied that it was correctly conceded that there was a material error of law therefore the findings of fact shall be set aside. I have to consider the issue of remaking the decision.
23. As to the remaking of the decision, I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. Both advocates are in agreement that by reason of the nature of the error of law that the correct approach to take is that the appeal should be remitted to the First-tier Tribunal. I agree with that assessment. As none of the findings of fact can be preserved, it will be necessary to undertake a full factual analysis of the evidence.

24. In the light of the issues raised in respect of the Appellant it will be necessary for the Appellant's solicitors to consider what, if any, evidence concerning the Appellant's mental health is to be adduced or any further evidence and, if appropriate, to agree any ground rules for the conduct of the hearing with the Tribunal and the Respondent so that the guidance can be complied with. In this respect it will be necessary for any directions sought in advance of the hearing by way of a Case Management Review Hearing.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside; no findings are preserved; the appeal shall be remitted to 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 her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

SM Reeds

Signed

Date: 18th July 2018

Upper Tribunal Judge Reeds