



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09831/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 12th December 2018**

**Decision & Reasons Promulgated
On 8th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

**MRS ABIDA RAFIQ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal (Counsel)

For the Respondent: Ms N Willocks-Briscoe (Home Office Presenting Officer)

DECISION AND REASONS

1. In a decision promulgated on 5th October 2018, the appellant's appeal against a decision to refuse her human rights claim was dismissed by First-tier Tribunal Judge J Pacey ("the judge"). The judge took into account an earlier dismissal of an appeal against refusal of the appellant's asylum claim and a finding in that earlier appeal that the appellant's account of fear of her father on return to Pakistan was not credible. In the present appeal, the judge found that the appellant had not received threats from her father and concluded that the appellant and her husband would not face obstacles of any substance on return to Pakistan. So far as the appellant's health is concerned, the judge found that she would have access to appropriate medical treatment in Pakistan.

2. In grounds supporting an application for permission to appeal, it is contended on the appellant's behalf that there has been no concession that she is unable to meet the requirements of the Immigration Rules ("the rules") and the decision fails to make clear how the judge came to conclude that such a concession was made. So far as insurmountable obstacles to integration on return are concerned, there were two witnesses who gave evidence, Mr B Hussain and Mr M Sadiq. The judge discounted the evidence of the first of those witnesses but nothing in the decision showed that any account was taken of the evidence given by Mr Sadiq, an independent witness and family friend who made a statement to the effect that he attempted a reconciliation between the appellant and her father, to no avail.
3. Mr Sadiq's evidence was material and relevant to the judge's assessment, including how the appellant's marriage would be viewed on return by her family and whether this would show insurmountable obstacles to family life with her husband continuing in Pakistan. The judge's finding at paragraph 43 of the decision that the appellant had not provided anything "beyond a bare assertion" was not sustainable.
4. The judge also erred in assuming that the appellant's husband was able to offer protection against threats from relatives on return. The evidence from Mr Sadiq was relevant in this context also.
5. Also in issue was the appellant's explanation regarding a caution issued to her. In her witness statement, she provided an explanation for a failure to reveal the caution when she made her human rights claim. It was not clear from the decision that the judge expressly considered this explanation in the light of the Secretary of State's guidance, published on 11th January 2018, that decision makers should take into account that a person may not be aware that a fine for a motoring conviction or a caution should be disclosed and that an application must not be refused if a person has made a genuine error in this context. Each case fell to be considered on its merits. The decision showed that the judge may not have properly engaged with the discretionary nature of paragraph S-LTR 2.2 of the rules or considered whether the appellant made a genuine error in not disclosing the caution. Moreover, the PNC was not available at the hearing, as the judge noted at paragraph 5 of the decision and it was arguable that the respondent had failed to discharge the burden of proving this part of his case.
6. On 2nd November 2018, permission to appeal was granted. There was no rule 24 response.

Submissions on Error of Law

7. Ms Iqbal said that guidance given in Devaseelan [2004] UKIAT 00282 was relevant. At paragraphs 34 to 36 of the decision, the judge identified the correct approach in the light of the earlier dismissal of the appellant's appeal against refusal of her asylum claim. However, at paragraph 38 the

judge erred in finding that there was no new evidence of probative weight justifying a departure from previous adverse findings regarding the credibility of the appellant's account. In fact, as the judge herself noted at paragraphs 16, 17 and 19, evidence was given by several witnesses, including Mr B Hussain and Mr M Sadiq. Mr Sadiq gave a detailed statement about the relationship between the appellant and her husband and how he was instrumental in seeking a reconciliation with the appellant's father. The decision contained no findings regarding this evidence. Mr Sadiq was mentioned in paragraph 19 but not elsewhere. The contrast with Mr Hussain's evidence was apparent from paragraph 40 of the decision, where the judge briefly took that evidence into account. Mr Sadiq's evidence bore on the genuineness of the marriage and the difficulties the appellant would face on return. It was relevant in relation to obstacles to family life continuing and obstacles to integration under the private life rule.

8. Ms Iqbal said that the other grounds relied upon were fully set out in the written application for permission to appeal.
9. Ms Willocks-Briscoe dealt with the grounds in the order in which they appeared in the application. The first ground was predicated on the basis that it was unclear from the decision why the appellant failed to meet the requirements of the rules. The decision letter showed that the Secretary of State relied on the suitability provisions and this was why the appellant could not succeed under Appendix FM or paragraph 276ADE. Seen in this way, the judge's conclusions towards the end of the decision, beginning at paragraph 47, were sound in relation to the failure to declare the caution. The third ground also related to the caution. The respondent did not adduce the PNC but the decision showed that the appellant accepted that she had been given a caution. The judge clearly rejected her explanation for failing to disclose it, at paragraph 49 of the decision. It was not unfair or unsound of the judge to reject the explanation and so the lack of the PNC itself fell away as a material factor.
10. The grounds contained no challenge to the adverse findings made in the earlier appeal, regarding the asylum claim, where the appellant was found not to be a credible witness. The judge in the present appeal correctly concluded that rejection of the asylum claim and the account of threats from the appellant's father could not be reopened in the family life context. Any evidence referring back to the asylum aspect, including Mr Sadiq's evidence, had little or no probative weight. His evidence amounted to a matter which could have been brought up earlier but was not. The appellant was not seeking to challenge the adverse asylum findings. It was important to note the rejection of the claim to be at risk from her father. It followed that the sole basis on which insurmountable obstacles were raised fell away because of the dismissal of the asylum appeal by the previous Tribunal.
11. The judge's assessment of the case was open to her, as was her analysis of the spouse's claim that in spite of his wife fearing that she would be killed in Pakistan, he was not willing to return with her. Paragraph 41 of

the decision dealt with this aspect. Overall, taking into account the previous findings regarding the asylum claim, the appellant had failed to show any real barrier to family life continuing abroad and the judge was entitled to conclude as she did.

12. Ms Iqbal made a brief response. So far as the first ground is concerned, the judge at paragraph 29 stated that it was “accepted” that the appellant could not meet the requirements of the rules but it was not clear who accepted that this was so. The decision letter referred to the suitability requirements but the judge only considered these at the end of the decision, as part of her overall conclusion that the appellant could not rely on the rules.
13. The judge did not consider the guidance given to decision makers by the Secretary of State on the weight to be given to a failure to disclose a fine or a caution. A rational assessment of the appellant’s explanation that she made a mistake required the guidance to be taken into account.
14. Notwithstanding the adverse findings regarding threats, it was clear that the appellant was maintaining her claim that her father disapproved of her marriage and that was still in issue. The test in relation to the risk from her father, by reason of his threats, was different from the fact that his disapproval of the marriage bore on whether there were insurmountable obstacles to family life continuing or obstacles to the appellant’s reintegration into Pakistan. It was in that context that the evidence from Mr Sadiq had obvious importance.
15. So far as the failure to disclose the caution and the suitability grounds were concerned, the burden was on the respondent and the evidence contained in the PNC was not produced. It was not disputed that the appellant had an encounter in a shop which led to police interest but the evidence bearing on that matter was simply not made available to the Tribunal. In her witness statement, at paragraphs 26 and 27, the appellant gave an account of the allegation of shoplifting made against her. Her explanation was part of the assessment of whether the discretionary ground of refusal was made out. The judge’s analysis was simply that the appellant accepted that a caution was given but, in that context, the respondent’s guidance was relevant. The relevance of such guidance was made clear in SF and Others (Albania) [2017] UKUT 120 (IAC).

Findings and Conclusions on Error of Law

16. The decision has been carefully prepared by a very experienced judge. I conclude, however, that the decision does contain errors of law, such that it should be set aside and remade.
17. The judge properly began her analysis by taking into account the earlier decision, following guidance given in Devaseelan [2004] UKIAT 00082. This earlier decision contained adverse findings in which the appellant’s asylum claim was rejected. She was found not to be a reliable witness in

relation to her claim that her father had threatened her. At paragraph 38 of the decision, the judge found that there was no new evidence of probative weight to cause her to depart from the previous findings. She correctly distinguished the present appeal from the earlier one and identified critical questions as, first, whether there were insurmountable obstacles to family life between the appellant and her husband continuing in Pakistan and secondly, whether there were obstacles to integration for the purposes of the private life rule contained in paragraph 276ADE.

18. The difficulty with the conclusion that there was no new evidence of probative weight is that although the judge deals with what Mr Hussain said, there is no engagement with the evidence given by Mr Sadiq. He is briefly mentioned in paragraph 19 but there is nothing else. If the overall finding that there was nothing new of probative weight was reached after considering what Mr Sadiq said, a reader of the decision would struggle to understand why his evidence made no difference.
19. So far as the caution is concerned, the appellant explained her failure to disclose it in her application for leave, at paragraphs 26 and 27 of her witness statement. The failure led the Secretary of State to conclude that the requirement of paragraph S-LTR 2.2(b) of the rules was not met. The judge found as a fact that the appellant received a caution but, as Ms Iqbal submitted, the ground of refusal is discretionary and the Secretary of State's guidance to decision makers is relevant in deciding whether it is made out. This is clear from SF (Albania). Although there is no "not in accordance with the rules" or "not in accordance with the law" ground of appeal available to the appellant, whether or not the requirements of the rules are met is an important part of the overall assessment of the human rights grounds. Paragraph 49 of the decision records, accurately, that there was no declaration of the caution in the application for leave but there is no mention of the guidance or of the appellant's explanation, save for a brief mention in paragraph 48 of the appellant's claim that she did not understand the procedures or the English language fluently.
20. For these reasons, I find that the decision contains material errors of law and that it must be set aside and remade. The parties were agreed that if an error were found, the venue for remaking should be the First-tier Tribunal. I agree, as the fact-finding will need to take into account evidence from all the witnesses relied upon by the parties.
21. The findings of fact made by the judge are not preserved and the decision will be remade de novo.

Notice of Decision

The decision of the First-tier Tribunal is set aside, as containing material errors of law, and will be remade in the First-tier Tribunal, by a judge other than First-tier Tribunal Judge J Pacey.

Signed

Date 6 March 2019

Deputy Upper Tribunal Judge R C Campbell

Anonymity

The judge made no anonymity direction and there has been no application for anonymity before me. I make no direction on this occasion.

Signed

Date

Deputy Upper Tribunal Judge RC Campbell