Upper Tribunal
(Immigration and Asylum Chamber) Appeal ref: HU/25945/2016

THE IMMIGRATION ACTS

Heard at Glasgow	Decision & reasons promulgated
On 25 January 2019	**On 06 February 2019**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by JK Law, Glasgow
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Buchanan heard the appellant's appeal on 9 April 2018 and dismissed it by a decision promulgated on 18 April 2018.

2. Mr Caskie referred firstly to a decision by FtT Judge Boyle in the case of an appellant, referred to herein as A, which arose from a set of circumstances involving A and this appellant, SB, in the same way. Judge Boyle heard the case on 15 May 2018 and allowed it on article 8 grounds by a decision promulgated on 17 May 2018.

3. A and SB both claimed to fear that AR, a serious criminal who trafficked them to and enslaved them in the UK, would seek revenge on them through his associates in Bangladesh, for having given evidence leading to his conviction in the UK.

4. I ascertained the following in course of submissions. A and SB, up to the time their appeals were decided in the FtT, were represented by the same firm of solicitors. The solicitor representing SB later left that firm and set up the firm now representing him. A did not change representatives. Neither Judge Buchanan nor Judge Doyle were advised of the other appeal in progress. Two further persons were also in the circumstances giving rise to the claims. Neither party to these proceedings had any information about those two cases. No application to link proceedings was made at any stage. SH has chosen not to make a protection claim. He does not wish to offer any explanation for declining to do so.

5. Representatives sent a copy of the decision of Judge Doyle to the UT and to the Presenting Officers' Unit by email on the evening of 24 January 2019. It was said that a copy was also sent by post about two days earlier, which I accept, although it has not yet been linked to the UT file. Mrs O'Brien was not aware of the matter until shortly before the hearing.

6. Mr Caskie said that the SSHD had not appealed the decision of Judge Doyle, which was "based essentially on the same facts". He accepted that the fact that divergent decisions had been reached did not disclose error of law. However, he submitted that where it had been established in an indistinguishable case that there was a risk of serious harm on return to Bangladesh, there was grave cause for concern.

7. Mr Caskie based his further submissions on two points, taken from (iii) and (iv) of the grant of permission.

8. It is necessary to deal only with matters arising from the decision of Judge Doyle, and with the submissions on (iii) and (iv).

9. The grant says at (iii) that it is arguable that Judge Buchanan erred when "intimating evidence was weakened and / or damaged if hearsay or there being a lack of corroboration" at 7.11 – 7.12 of his decision.

10. The issue identified at (iv) is that the judge addressed whether the appellant faced very significant obstacles to his integration of returned to Bangladesh "in an arguably narrow and / or arbitrary assessment of mental health issues … and like treatment of the expert evidence thereto, a psychology report and a country expert report".

11. Mr Caskie contrasted 7.11 – 7.12 of Judge Buchanan's decision with 14 – 15 of Judge Doyle's decision, and suggested there was an "attitudinal difference" of approach to the evidence of witnesses L and B, who spoke to threats uttered by AR. He submitted that there was no reason for AR to portray himself as powerful and connected, if that was not so. The expert

report, by its nature, could not confirm that AR had such connections, only that there was a class of such persons in Bangladesh. In referring to the "appropriate standard of proof" at 7.12, Judge Buchanan erred by finding the evidence insufficient. He looked for too much. He had not factored in the consistency of the claim with background evidence and the expert report. He was not entitled to subject the appellant to a "counsel of perfection". A different outcome from two judges was not in itself an error of law, but was shown to be such by reference to their respective reasoning. A had the ability and motivation to track SB down in Bangladesh, which was enough for his case to succeed on "very significant obstacles". From the fact that the SSHD did not even seek permission to appeal the decision of Judge Doyle, the UT should find that Judge Buchanan applied too high a standard of proof to the prospect of revenge in Bangladesh.

12. On the mental health issue, Mr Caskie said that the conclusion at 7.15 did not follow from the evidence of the psychologist cited at 7.13 and 7.14. The UK has an obligation to victims of trafficking. SB has been accepted to be such a victim. Even if it was not established that AR presents an objective risk, it was relevant that subjectively SB is in fear of him, because his perceived need to hide in Bangladesh has consequences on his mental health. The judge erred by leaving that out of account as an obstacle to integration. That should lead to a remaking, in which context there was further evidence, derived from the decision of Judge Doyle, to bring to bear.

13. To clarify his position on the admissibility and relevance of the decision of Judge Doyle, Mr Caskie said that it was admissible to show error of law, but even if not, error could be found within the four corners of the decision of Judge Buchanan and on the evidence before him (the "standard of proof" point). The error was merely confirmed by reference to the decision of Judge Doyle.

14. On further procedure, if the decision were to be set aside, Mr Caskie said there was no need for a remit to the FtT or for a further hearing. On remaking, he relied heavily on evidence narrated in the decision of Judge Doyle, which had not been before Judge Buchanan (having been received by representatives between the dates of the two hearings). At 19 Judge Doyle refers to a letter from a detective constable "which says that the trafficker and his wife have strong political and criminal connections in Bangladesh." That was sufficient to justify a conclusion in the present case as reached by Judge Doyle at 20: there were "very significant obstacles" to return because that would place the appellant "within the range of ruthless … traffickers". Alternatively, if the reference to the evidence in the decision of Judge Doyle was not enough, the UT should fix a hearing, to give the appellant the chance to produce the letter from the detective constable. Mr Caskie went on to say that, pragmatically, the UT should resolve the case on what is now known, rather than the appellant having to undertake further lengthy procedure.

15. When replying to the submission for the respondent, Mr Caskie said that the decision of Judge Doyle should be admitted despite late notice, because the point of the rules was only to ensure fair notice, and the respondent had been able to make a considered and detailed reply. There had been no prejudice.

16. Having considered also the submissions for the respondent, I find that it has not been shown that the making of the decision of Judge Buchanan involved the making of any error on a point of law.

17. The decision of Judge Doyle is, in principle, irrelevant to whether Judge Buchanan made an error of law. Any such error must be found within the bounds of the case put to the judge and his decision on it.

18. There was no submission by reference to rules, directions or case law on whether the UT might, exceptionally, be entitled to admit and consider the decision of Judge Boyle, for any purpose. The length of notice is only one of many criteria.

19. The possible relevance of evidence which was not before Judge Buchanan but was before Judge Doyle must have been apparent long ago. No reason emerges for this not being raised with the respondent or with the tribunal until shortly before the hearing in the UT. It was said that the police letter is in the hands of other agents, but arrangements could have been made to obtain it long ago. That would have revealed more detail, and would have removed one of the several apparent layers of hearsay involved.

20. No good reason is shown to consider the decision of Judge Doyle in relation to error of law, even if it had been promptly intimated.

21. Judge Buchanan did not doubt that the witnesses L and B accurately reported what AR said to them. Hearsay evidence is admissible in tribunals, but there is no rule such that AR's reported statements were to be taken at face value. (He might have been boasting, or he might have hoped that what he said would be repeated to and would intimidate witnesses; there was other evidence of such behaviour.) Nothing in the decision suggests that Judge Buchanan was not aware that the general possibility of AR having powerful criminal and political connections in Bangladesh was consistent with background evidence and the expert report. That matter was obvious, and it would have been very surprising if the judge thought otherwise. Within the bounds of the case which was before Judge Buchanan, the submissions on (iii) are only disagreement, couched in the language of standard of proof.

22. Even if the decision of Judge Doyle were to be admitted, it does not disclose the making of any error by Judge Buchanan, either on the case which was before him, or constructively, by reference to matters which were not before him.

23. The fact that another judge may have reached a different conclusion based on similar evidence is, in principle, and as accepted, neither here nor there. The criticism is of lesser force where the evidence before the other judge was in at least one respect noticeably stronger (the police letter).

24. Judge Buchanan made no error in finding the evidence on mental health issues to fall short of "very significant obstacles to integration".

25. Mr Caskie suggested that it had been the SSHD's responsibility to apply to link the two (or possibly up to four) hearings. That may be so, but there was a similar responsibility on the appellants and their representatives. The tactic of not making a protection claim where that was the obvious course is unexplained, and it is doubtful whether this claim properly fits into the guise of a private life claim in terms of integration. Those observations, however, are incidental.

26. It is for the appellant to consider whether a further claim, and of what nature, is available. Any delay in resolving matters lies with him and with his representatives, rather than with the respondent or the tribunals.

27. The decision of the First-tier Tribunal shall stand.

28. The FtT made an anonymity direction. The matter was not addressed in the UT, so anonymity is maintained herein.

28 January 2019
UT Judge Macleman