



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: PA/10625/2017
PA/10626/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 5 March 2019**

**Decision & Reasons Promulgated
On 25 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**ABA
SA
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr. A. Barnfield, Counsel instructed by Freedom Solicitors
For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against a decision of First-tier Tribunal Judge Dhaliwal, promulgated on 7 December 2017, in which she dismissed the Appellants' appeals against the Respondent's decision to refuse a grant of asylum.
2. As these are asylum appeals, I make an anonymity direction.
3. Permission to appeal was granted as follows:

“It is arguable that there were errors in the assessment of the credibility of the appellants’ claim for asylum due to the repeated use of the concept of plausibility and the guidance of the Court of Appeal in *HK v SSHD [2006] EWCA Civ 1037*. It is arguable that the assessment of the credibility of the asylum claim has infected the view taken of the documentary evidence in support of the claim. It is apparently accepted in the grounds that the First-tier Tribunal was entitled to hold against the credibility of the appellants that they had denied an earlier application for entry clearance for the second appellant, but it is arguable that even if this fact is properly balanced against the appellants it cannot be said that the outcome of the appeal would be that it was bound to be dismissed”.

4. The Appellants attended the hearing. I heard submissions from both representatives following which I stated that the decision involved the making of a material error of law. I set the decision aside and remitted it to the First-tier Tribunal to be re-made.

Error of law

5. There are two grounds of appeal. The first concerns the Judge’s credibility findings, and the second concerns the documents provided, although to a large extent these issues are connected.
6. Although the Judge has set out at [9] the correct burden of proof, and at [23] has stated that “In assessing the credibility of the Appellants, I considered all of the evidence that was before me”, I find that she has in fact failed to take into account all of the evidence when assessing the credibility of the Appellants, as she failed to take into account the documentary evidence until after she had made her finding as to the Appellants’ credibility.
7. I further find that she has consistently referred to the concept of plausibility without taking into account the Appellants’ evidence. Therefore she has found certain aspects of the Appellants’ account to be implausible without stating why she has rejected the Appellants’ evidence. At [30] she states:

“In assessing this aspect, if I accept at face value that the sister of her boyfriend was present on each occasion, it then seems unlikely in view of the culture prevalent in Iraq and females not being allowed to have boyfriends, that the Second Appellant and H would be in a position to either verbally express their feelings to each other, have intimate conversations with each other or be demonstrative in front of the sister. More so, that they would not be able to show any displays of affection towards each other in a crowded public place, let alone, hold hands, kiss and hug openly, as the Second Appellant mentions on (sic) her statement. This is inconsistent with objective country information. It seems implausible that a relationship would have grown with the sister accompanying them on each occasion or that they would have conducted themselves in the manner suggested in a public place, which is only 30 minutes away from where she lived.”

8. The Judge failed properly to consider the evidence of the involvement of H's sister. She has used the presence of the sister to strengthen her finding that the second Appellant and H would not have been able publicly to display affection, but this is not the way that the evidence was presented. On the contrary, it was put forward in evidence that the reason the second Appellant and H were able to meet up in public was due to the presence of H's sister. This is clearly explained in the second Appellant's statement. At [5] she states that she met H's sister before she met H. At [6] she states that it was H's sister who said to the second Appellant that H liked her. Throughout the statement she explains how she was able to see H due to his sister being present. The evidence was that the presence of H's sister legitimised the second Appellant and H being together in public.
9. However, the Judge has taken the evidence to show that the second Appellant would not have been able to develop a relationship with H with his sister being there. She has not indicated that she has rejected the evidence of the second Appellant that she was introduced to H by his sister, or that it was H's sister who indicated to the second Appellant that H was interested in her. Rather she has stated that she has found it unlikely that they would be able to continue a relationship with H's sister present. I find that she has selectively cited the second Appellants' evidence in this paragraph in relation to how they were able to meet, hold hands, kiss and hug, etc., without referring to the second Appellant's evidence as to why they were able to do this.
10. I find that the Judge has failed to take into account all of the evidence which was before her when making her findings in [30]. She has failed to give reasons for why she has not accepted the evidence that the second Appellant was able to be with H in public due to the presence of his sister. At [34] she again states that the presence of H's sister would not have enabled the relationship to progress. This runs entirely contrary to the second Appellant's evidence, and again there is no reason given for rejecting this part of the evidence.
11. The Judge has referred to the background evidence when considering this account, and its plausibility, but this does not mean that she can ignore the explanation given by the second Appellant. It was incumbent on the Judge to consider that explanation rather than selectively to choose which parts of the second Appellant's evidence to rely on in her findings. I find that this is a material error of law.
12. The Judge finds at [35]:

"I am simply not persuaded on the evidence that there was in existence a relationship with H and that she engaged in sexual intercourse with him. I do not find the account given to be a credible and plausible account. It thus follows, if there is no sexual intercourse, there is no risk to the Second Appellant from her uncle, if there is indeed an uncle in the background. As this is my finding then the risk to the Appellants disappear."

13. At [39] she states:

“It is my view that the credibility of the both (sic) Appellants is damaged and on that basis, as I have been unable to accept either of their accounts.”

14. I find that these paragraphs clearly show that the Judge made her finding that there was no risk to the Appellants from the uncle prior to consideration of the documents, which are not considered until [40] and [41]. The conclusion that there is no risk is based on her findings set out from [30] to [34]. Although the “assessment of evidence and findings of fact” start at [23], the first findings do not appear until [30]. I have stated above these findings have not been adequately reasoned, and that the Judge has failed to explain why she has rejected some of the evidence, relying instead on selected parts.

15. The Judge came to her conclusion that there was no risk to the Appellants from the uncle before considering the documentary evidence. Her credibility findings have been applied to the documents without considering the documents in their own right. The two short paragraphs at [40] and [41] are the full extent of the consideration of the documents on which the Appellants relied. The documents are not referred to elsewhere in the decision. The Judge states:

“I also question the assertion that the uncle is a member of the PUK Party, has considerable influence over others and could trace them is reliable. In support, a copy of a mediation agreement was placed before me together with a newspaper article. These documents appear to have been obtained by an Omer Ali, who is said to be the person who assisted them in leaving Iraq and was traced by the Second Appellant through Facebook. Facebook entries have been exhibited to show a conversation that took place between Omer Ali and the Second Appellant. It is said that they have been able to obtain these documents as Omer Ali knows one of the mediators which is how the mediation document is said to be placed before me. [40]

On the face of it, whilst the documents are before me, based on my concerns about credibility thus far and in the absence of anything further, I cannot be satisfied of the authenticity of these documents. As it happens, the “newspaper article” seems to refer only to initials and not names. I cannot infer from that that they relate to the same individuals that have been referred to in this decision. Likewise, I find it is rather convenient that Omer Ali just happens to know one of the mediators.” [41]

16. The Judge gives no detail of what the mediation document is about. There is no detail regarding the newspaper article. From a reading of the decision, it is not at all clear what these documents are. They have been dismissed purely on the basis of the Judge’s credibility findings, and have not been considered as stand-alone documents.

17. Mr. Mills submitted that the Judge had assessed all the evidence, as she had stated at [23], but I find that it is clear that her conclusion was reached prior to any proper consideration of the documents. The

credibility findings are made at [34] and [39], but there is no consideration of the documents until [40]. I find that the Judge has failed to consider the evidence in the round. This is a material error of law.

18. I find that the decision involves the making of material errors of law. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, given that the credibility findings cannot stand, and having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

19. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
20. The appeal is remitted to the First-tier Tribunal to be remade.
21. The appeal is not to be listed before Judge Dhaliwal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 21 March 2019

Deputy Upper Tribunal Judge Chamberlain