Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14083/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 August 2019

Decision & Reasons Promulgated
On 20 August 2019

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

NB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Shah, counsel instructed by Taj Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge E B Grant, promulgated on 7 March 2019. Permission to appeal was granted by Upper Tribunal Judge O'Callaghan on 7 July 2019.

Anonymity

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2. Such a direction was made previously owing to the vulnerability of the appellant and is repeated below.

Background

3. The appellant arrived in the United Kingdom during December 2013, having been granted leave to enter as a visitor. After her leave to enter expired on 9 June 2014, she remained without leave. The appellant made an asylum application on 13 February 2018.

4. The appellant's asylum claim was based on her concerns as to what would happen to her in Bangladesh following a marriage which she had contracted in the United Kingdom which had broken down. In addition, the appellant's child, U, aged 4, had additional needs.

5. In a letter dated 5 December 2018, the Secretary of State rejected the appellant's protection and human rights claims. The protection claim was refused owing to numerous inconsistencies within the appellant's account of her circumstances and the human rights claim was found not to meet the requirements of Appendix FM. The respondent considered whether there were any exceptional circumstances but concluded that the evidence did not indicate that it would be inhumane to remove either the appellant or her child. Humanitarian Protection was considered in relation to Articles 2 and 3, however the respondent concluded that there were no substantial grounds for believing that there was a real risk of serious harm on return to Bangladesh.

The hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, there was evidence that the appellant had learning difficulties for which she was eligible for services from Westminster Learning Disability Partnership; that U suffered from developmental delay and had been referred for an autism assessment and both had been abandoned by the appellant's husband. The appellant's case was that she would have no support from her parents in Bangladesh and would become destitute and unable to access services for U. The judge rejected that claim, finding that the appellant's marriage took place with the consent of her parents and that on return to Bangladesh she and her child would be living with her parents in Sylhet. The judge also found that appropriate free treatment was available for U in Dhaka and Sylhet and ultimately, that the balance of the Article 8 arguments fell in favour of the respondent. The judge noted that no claim had been made for humanitarian protection.

The grounds of appeal

7. The grounds of appeal argued that the judge's finding that support would be available to the appellant was inconsistent with the evidence of the witnesses who were found to be credible. It was also contended that treatment was not available for someone like the appellant who was not

based in Dhaka. It was further contended that the judge was wrong to say that Humanitarian Protection was not relied upon as this alternative was pleaded in the written submissions. Lastly, it was said that the judge erred in the outcome of her proportionality assessment.

8. Permission to appeal was granted on all grounds. In addition, the judge granting permission stated that it was arguable that there had been no consideration of *N* [2005] UKHL 31 or *R(SQ (Pakistan))* [2013] EWCA Civ 1251.

9. The respondent's Rule 24 response, received on 8 August 2019, contended that Article 3 on medical grounds did not appear to have been argued before the First-tier Tribunal and it was unclear whether that formed part of the application for permission to appeal to the First-tier Tribunal which was refused on 12 April 2019. The appeal was opposed.

<u>The hearing</u>

10. Mr Shah clarified that he was relying on three grounds. Firstly, that the judge made inconsistent findings; secondly the judge attached insufficient weight to the reports and thirdly that Article 3/Humanitarian Protection was an issue the judge neglected to determine.

11. Starting with the third ground, Mr Shah contended that Article 3 on health grounds was a live issue, albeit it was not expressly mentioned in the grounds of appeal against the respondent's decision of 5 December 2018. He took me to the appellant's bundle which included lengthy written submissions but was unable to find any reference to Article 3 being argued on health grounds. I drew Mr Shah's attention to page 16 where there was a passing reference to death being a "near certainty." Mr Shah asserted that he had raised Article 3 and Humanitarian Protection at the hearing but provided no witness statement to that effect or copy of any record of the hearing he might have made. His explanation for not doing so was that he received the Rule 24 response late. I informed the parties that the judge's typed record of proceedings lacked submissions on the appellant's behalf relating to Article 3 or Humanitarian Protection. Mr Shah argued that in any event, it was an obvious point and Article 3 was expressly mentioned on page 22 of the appellant's bundle.

12. Regarding the first ground, Mr Shah argued that the judge found the appellant's sister and brother in law to be credible witnesses and it was therefore inconsistent of the judge to reject their evidence. He submitted that there had been no assessment of the witness evidence regarding the circumstances the appellant would face in Bangladesh. Lastly, he submitted that insufficient weight was given to the medical evidence which was before the judge. Mr Shah emphasised that the appellant was from a rural part of Sylhet and the judge had found that the appellant could have treatment in Dhaka, even if treatment was available and accessible, there was a question of affordability.

13. Mr Melvin argued that there was insufficient evidence in the written submissions for the Upper Tribunal to grant permission regarding Article 3. It was difficult to find anything other than the briefest reference to Article 3 and there was no reasoning as to why there would be a breach on return. In any event, he argued, the case did not go near the standard required in Article 3 cases.

14. Mr Melvin emphasised that Taj Solicitors had produced no witness statement and there was nothing on file to show that submissions relating to Article 3 were made to the First-tier Tribunal. The correct procedure would be for a witness statement from the advocate at the previous hearing and another advocate to attend the error of law hearing. He acknowledged that the Rule 24 response was delayed, however he argued that there was still sufficient time for counsel to be instructed and a witness statement to be drafted.

15. As for the judge's credibility findings, these were qualified and there was no indication that the judge accepted the evidence that all the family members living in Bangladesh had shunned or ceased contact with the appellant. The judge's findings related only to the circumstances of the appellant's visit to the United Kingdom and her wedding. Mr Melvin submitted that the judge looked at the background evidence and turned her mind to the core issue of whether the appellant could return home.

16. After assessing that evidence, Mr Melvin argued, the judge concluded that the appellant and her child would have the support of family members. The weight to be attached to evidence was a matter for the judge and her findings did not enter the realm of irrationality.

17. In reply, Mr Shah argued that the Upper Tribunal could depart from the grounds of appeal in this case where an issue was *Robinson* obvious. He maintained that there was no consistency with the judge's findings notwithstanding Mr Melvin's submissions. The judge had not explained why she had rejected the evidence of the appellant's sister and brother in law.

18. At the end of the hearing, I reserved my decision as to whether there was a material error of law.

Decision on error of law

19. I will firstly assess the judge's findings as to the credibility of the appellant's claim that she and U will be homeless and destitute in Bangladesh because no member of their family will support them. The positive findings at [9-10] of the decision upon which Mr Shah heavily relied were clearly limited to the circumstances of the appellant's visit and marriage to her husband. I accept that the judge found the evidence of the appellant's sister to be "cogent and credible" regarding the matters set out in [9]. In the following paragraphs [11-15], the judge simply records the remainder of the oral evidence of the sister, as well as her husband

and the appellant. That evidence addressed the appellant's relationship with her parents and the circumstances she would face if she returned to Bangladesh. Between [16-23] of the decision, the judge assessed that evidence in the round along with the medical evidence, the country background information and the decision in *SA (divorced woman – illegitimate child) Bangladesh CG* [2011] UKUT 00245 (IAC). Contrary to Mr Shah's arguments, the judge did not accept all the evidence of the appellant's sister. At [20], the judge gives several sustainable reasons for rejecting the claim that the appellant's parents will have nothing to do with her. Those reasons include that the appellant's marriage to her husband was arranged by her brothers and took place with the approval of her family; the judge did not accept that the marriage would have gone ahead without the approval of the appellant's parents; there was no evidence to support the claim that the family in Bangladesh had disowned the appellant; there was no evidence from the appellant's brothers, one of whom had sponsored her visit and the appellant spoke to her mother regularly.

20. The judge concluded that the position of the appellant was not analogous to that of the appellant in *SA*. Given that the appellant is a married woman whose child was born following that marriage and that she has the support of her family, the judge was wholly entitled to come to that view. There is no inconsistency in the judge's findings.

21. I will now consider the ground relating to the judge's "failure" to address Humanitarian Protection. At [26], the judge dismissed the appellant's claim under Articles 2 and 3 ECHR for the same reasons she dismissed the claim under the 1951 Convention. Mr Shah asserts that he made submissions relating to humanitarian protection. Other than his assertion, he has produced no evidence to support that claim and there were no arguments based on humanitarian protection in the record of proceedings. The detailed written submissions which formed part of the appellant's bundle before the judge lacked any mention of Humanitarian Protection. Furthermore, neither in the permission grounds, the skeleton argument produced for the error of law hearing nor in Mr Shah's oral submissions have any arguments been made which might indicate that a Humanitarian Protection claim could succeed even if it were considered. Mr Shah argued that it was a "*Robinson*" obvious point which begs the question why submissions on Humanitarian Protection were never made by an experienced representative and firm of solicitors.

22. It might have been helpful if the judge had briefly addressed Humanitarian Protection and the Article 3 case law, however, in view of her conclusions that the appellant and U would not face persecution or inhuman or degrading treatment in Bangladesh and that there was treatment available in Sylhet for U's developmental issues, there was no basis for a finding that there was a real risk of the appellant and U facing treatment contrary to Article 3 ECHR. Therefore, any error is not material.

23. Mr Shah did not even begin to establish that the conditions which the appellant would experience in returning to Bangladesh would amount to a breach of her rights, or those of U, under Article 3 of the ECHR. He simply did not explain why the appeal ought to be allowed on this basis, other than briefly mentioning *SA*. Mr Shah referred to no evidence to suggest that the appellant's circumstances and that of her child met the high threshold required in Article 3 cases. His submissions to the First-tier Tribunal and the Upper Tribunal accepted that treatment for learning disabled children was available, free of cost. He did not dispute that this treatment was also available in Sylhet, where the appellant would be returning. He referred me to no evidence to show that either the appellant or her child's health, mental or physical, would deteriorate in Bangladesh.

24. Lastly, the arguments relating to the judge's proportionality findings amount to mere disagreement with the outcome of the appeal. Contrary to Mr Shah's submissions, the judge did not limit the weight she placed on the medical evidence, all of which she found to be reliable. Mr Shah did not put forward a cogent argument as to why the removal of the appellant and U to Bangladesh would be a disproportionate outcome. The judge's treatment of the competing issues was manifestly fair. She was entitled to take into consideration the appellant's overstaying, that the child was non-qualifying under section 117B(6) and that the appellant was already a burden on public funds; balancing that against the best interests of U and the special needs of both the appellant and U and conclude that the balance fell in favour of the respondent. There is no error in the judge's proportionality assessment.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

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 him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 13 August 2019

Upper Tribunal Judge Kamara