Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09576/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre (remote hearing)	**Decision & Reasons Promulgated**
On 18th January 2021	**On 24th February 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

JRG + 6
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Wood, IAS (Manchester)**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Honduras born in 1989. His dependants are his wife and five children. They seek international protection on the grounds that they have a well-founded fear of persecution in their home country for reasons of their membership of a particular social group/political opinion. The Respondent rejected that claim on the grounds that it was not credible. The

First-tier Tribunal (Designated Judge of the First-tier Tribunal McClure) agreed and the appeal was dismissed. The Appellant now has permission to appeal against the decision.

2. The basis of the family's claim to protection was that they are at a real risk of harm in their home area of Villanueva from an armed gang known as MS-13. MS-13 had imposed upon the Appellant an *Impuesto de Guerra* – a 'war tax' – a sum to be paid each month on pain of death. The Appellant paid the money regularly before he and his wife decided that they could not pay anymore. They arranged to leave the country, having first sought internal flight to La Libertad for about a month before boarding their flights.

3. Judge McClure did not accept that this claim engaged the Refugee Convention. The gang's actions were solely motivated by money, and the evidence does not disclose some ulterior political motive, either on their part, or on the part of the Appellant in refusing to pay. Nor did he find the claim to be consonant with the country background material, which indicated that MS-13 seek to avoid local confrontations and are not therefore routinely involved in extortion, other than at high level, involving for instance big transport companies. There was further inconsistency in the chronology in that the Appellant had apparently remained in Villenueva for two months without paying MS-13 the money, and yet they had taken no action against him. His stay in La Libertad whilst waiting for a visa was further inconsistent with his claimed fear. Overall Judge McClure was not satisfied that the burden of proof has been discharged, even to the lower standard, and the appeal was dismissed.

The Appeal

4. The Appellant was granted permission to appeal to this Tribunal on the 27th February 2020 by Designated Judge of the First-tier Tribunal Macdonald. The sole ground at that stage was that the First-tier Tribunal had erred in failing to make any findings on the evidence of the Appellant's wife, who had provided detailed written and oral evidence in support of her husband's account. The failure to make such findings amounted, it was submitted, to an error of law: AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230.

5. Shortly after permission was granted the United Kingdom entered its first 'lockdown' of the Covid-19 pandemic. There was, as a result, some delay in dealing with this appeal. On the 1st April 2020 Upper Tribunal Judge Pitt gave directions indicating her provisional view that the preliminary stage of this appeal – determining whether the First-tier Tribunal decision should be set aside for error of law – could be deal with on the papers. She invited written submissions from the parties.

6. The Tribunal received the Appellant's 'Further Submissions' on the 18th May 2020. These expand generally on the issue raised on the grounds, and then say this:

> "the Appellant anticipates that the Respondent will seek to argue that any failure to provide a particularised finding on the wife's evidence is immaterial due to other reasons given by Judge McClure".

In such anticipation, the Written Submissions raise a number of other points about the First-tier Tribunal's findings. In particular it is submitted that the Tribunal erred in making a partial and selective reading of the country background evidence, and in making a number of mistakes of fact.

7. The Secretary of State responded on the 21st May 2020 by way of a 'Skeleton Argument' written by Senior Presenting Officer Mr C Bates. In respect of the primary ground the Secretary of State did indeed assert that any failure to make findings on the wife's evidence was immaterial, but not for the reasons foreshadowed by the Appellant's written submissions. Rather Mr Bates simply pointed out that the accounts of both husband and wife were broadly consistent, and so it followed from the findings made against the Appellant that his wife's account was similarly rejected. In respect of the new matters raised in the written submissions, Mr Bates objects on the grounds that permission has not been granted on those points.

8. In compliance with Judge Pitt's Directions the Secretary of State's 'Skeleton Argument' was followed by the "Appellant's Response to the Respondent's Further Submissions" dated the 26th May 2020. This document largely consists of quite unnecessary repetition, but it also makes clear that it is not the Appellant's intention to raise new grounds of appeal: the points about the mistakes of fact etc are simply made in order to counter any allegation of immateriality.

9. The file was reviewed by Upper Tribunal Judge Finch on the 19th August 2020, who decided that in the circumstances a live 'remote' hearing would be in the interests of justice. She gave liberty to apply, but neither party did. The appeal was accordingly listed for the first available date, and this was how it came before me. I heard oral submissions from both representatives for which I am grateful, and particular thanks must go to Mr Wood who assisted both myself and Mr McVeety by providing an electronic set of papers enabling the case to proceed in the absence of the file, which due to administrative error had not arrived with me in time for the hearing. I confirm that I received the file shortly after the hearing and I have read its contents in light of the submissions that I heard. I reserved my decision which I now give.

Error of Law: Discussion and Findings

10. I deal first with the ground of appeal that was considered arguable by Judge Macdonald. In AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230 the Upper Tribunal directed that where witnesses are called to give evidence, findings should be made on such evidence:

> The necessity to make proper findings of fact in relation to *all* the oral evidence, and not merely that given by the appellant, is one which is being overlooked by adjudicators with unfortunate frequency. For that reason, it is intended that this determination should be reported for the guidance of adjudicators as to the necessity to make proper findings on the evidence of *all* the witnesses called before them.

11. Here, the Secretary of State accepts, the Appellant's wife gave evidence broadly consistent with his own. That being the case, she argues, there was no need for Judge McClure to make separate findings on her testimony. The case was rejected, it is submitted, because it "ran contrary to the background evidence", and because "lacked credibility". That reasoning of the First-tier Tribunal, submits the Secretary of State, should be read as "equally applicable to a rejection of the wife's evidence".

12. The Secretary of State has, with these submissions, defeated her own argument on two fronts.

13. First, they serve to support the Appellant's contentions that the matters raised in the written submissions are indeed admissible as an answer to an allegation of immateriality. If the answer to the AK (Turkey) ground is to point to the findings on the background information and credibility issues, it is incumbent upon me to see if those findings were of sufficient strength to uphold the decision, notwithstanding any error in the failure to assess the wife's evidence. Although it would clearly have been preferable had these matters been advanced as grounds of appeal, in presenting them in this way Mr Wood has performed the neat trick of smuggling them into the pleadings without having leave to do so.

14. Second, in her acknowledgement that the evidence of two witnesses, both tested under cross examination, was broadly consistent, the Secretary of State has illustrated the real difficulty with the decision. It is a matter of weight. The consistent evidence of two witnesses is logically capable of attracting greater weight that the consistent evidence of one. Although the decision refers to the fact that the wife was called to give evidence [at §28], nowhere are any findings made on her testimony. That is an omission amounting to an error of law: AK (Turkey).

15. If any further illustration is necessary, I note that the omission has direct bearing on one of the factual errors identified by Mr Wood. At its §49 the Tribunal draws adverse inference from what it understands the evidence to be: "there was no suggestion that the gang called [for] the money in either December or January and the appellant has not given any satisfactory explanation why they did not". In fact, the oral evidence was that the gang were last paid off in January, and that the family left the country a few weeks later, before the next payment was due. I can see from the record of proceedings that this was a matter expressly canvassed in the cross examination of the Appellant's wife:

    "Q. Between last payment and the time you left- did you rec any threats from the gang?

    A. Last payment Jan – went to mothers for the last 3 weeks before coming here. We did not have any more contact with them in February"

16. Accordingly, I am satisfied that decision of the First-tier Tribunal is flawed for error of fact in respect of the evidence, and for the failure to consider the evidence of a witness.

17. It follows that I need not say much about the other points raised by Mr Wood. I accept that the First-tier Tribunal misunderstood the chronology and imported into its reasoning something that did not feature at all in the evidence: it wrongly believed that the Appellants would need United Kingdom visas before leaving, when in fact Hondurans were at that time non-visa nationals. As for the plausibility of the account Mr McVeety may well be correct to say that the general tenor of the reports is that the gangs would not bother with 'small fry' such as the Appellant, but the country background evidence is not so unequivocal that the possibility of this claim being plausible could be excluded.

18. The decision is therefore set aside in its entirety, and the decision needs to be remade. The parties agreed that in the circumstances the most appropriate forum for than would be the First-tier Tribunal.

Anonymity Order

19. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

    "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 his family. This direction

applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

1. The decision of the First-tier Tribunal is set aside.

2. The decision in the appeal is to be remade in the First-tier Tribunal

3. There is an order for anonymity.

Upper Tribunal Judge Bruce
5th February 2021