Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/52720/2020
(UI-2022-002585); IA/02769/2021

THE IMMIGRATION ACTS

Heard at the Immigration and Asylum Chamber	**Decision & Reasons Promulgated**
On 19 October 2022	**On 9 December 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

P K
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rashid, Counsel instructed on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Anonymity :
Rule 14: The Tribunal Procedure(Upper Tribunal) Rules 2008:
Anonymity is granted because the facts of the appeal involve a protection claim. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction**:**

1. The appellant, a citizen of India, appeals with permission against the decision of the First-tier Tribunal Judge Ali (hereinafter referred to as the "FtTJ") who dismissed her protection and human rights appeal in a decision promulgated on the 6 April 2022.

2. Permission to appeal was granted by FtTJ Kudhail on 25 May 2022.

Background:

3. The history of the appellant is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle.

4. The appellant is a citizen of India. She arrived in the United Kingdom on 24 October 2009 with the Tier 4 student Visa. She was granted an extension on 18 January 2011 valid until 16 February 2012. The appellant returned to India in 2011 for 3 weeks and also in 2012 for 2 weeks. She was granted a further extension to her Visa on 13 June 2012 valid until 31 July 2012.

5. As a postgraduate worker, she was granted an extension of leave on 10 September 2012 until 10 September 2014. It is recorded that she travelled to India in April 2013 where she stayed for 3 weeks; she returned in June 2014 stayed the 2 weeks and on 5 September 2004 she applied further leave to remain as a student.

6. On 24 December 2014, the application was refused with the right of appeal. On 12 January 2015 she lodged an appeal against that decision. On 14 April 2015, the appeal was dismissed. She lodged an application for permission to appeal; it was refused and her permission to appeal via the Upper Tribunal was granted on 29 September 2015. At a hearing before the Upper Tribunal her appeal was dismissed on 15 December 2015. Her application to the Court of Appeal was also refused on 15 July 2016, 6 July 2017 and 3 November 2017. She became appeals rights exhausted on 3 November 2017.

7. On 8 January 2018 she was served with a RED.001 as an overstayer. On 1 February 2018 she lodged an application to remain in the UK on compassionate grounds outside the rules. This was supported by a letter written by her representatives dated 30 January 2018 set out in the respondent's bundle. On 10 July 2018, the application was rejected.

8. On 2 August 2018, an application to remain in the UK on compassionate grounds was resubmitted and was refused on 2 November 2018.

9. On 23 November 2018 she was served with the decision on reporting and detained. On 26 November 2018, an asylum application was made, and she was released from detention.

10. The basis of the appellant's claim was that she feared her husband whom she had married in India and had accompanied her to the UK before returning in 2014. The FtTJ set out the full details of her factual claim between paragraphs 11 – 17 of his decision.

11. The respondent refused the appellant's protection appeal in a decision taken on 24 November 2020. Whilst the respondent accepted that the appellant had been married to her husband and he had entered the United Kingdom via a visa, the respondent did not accept that the appellant had suffered any problems with her marriage or had suffered violence at the hands of her husband.

12. The appellant appealed against that decision, and it came before the FtTJ on 22 February 2022. In a decision promulgated on 6 April 2022, he dismissed her appeal on asylum and human rights grounds. In his decision the FtTJ did not accept that the appellant had given a reliable factual account as to risk on return to India on account of her relationship with her husband or that he had any influence or power within India so as to cause her to be at risk of harm on return. The FtTJ also gave reasons as to why on article 8 grounds, the decision reached by the respondent was not disproportionate.

13. The appellant sought permission to appeal that decision and on 25 May 2022 FtTJ Kudhail granted permission for the following reasons:

> "The grounds assert that the judge erred in failing to give reasons why the appellant's claim to have suffered gender-based violence, did not former PSG, particularly in light of the respondent's acceptance that she had an innate characteristic and objective evidence was cited supporting the appellant's account (paragraph 44). There is an arguable error of law."

14. Mr Rashid, of Counsel appeared on behalf of the appellant and Mr Diwnycz, Senior Presenting Officer appeared on behalf of the respondent.

15. Mr Rashid relied upon the written grounds of challenge and also supplemented them by his oral submissions. Mr Diwnycz confirmed that there was no 24 response filed on behalf of the respondent but also made oral submissions.

16. It is not necessary to set out those submissions and they will be considered below when undertaking an assessment as to whether the decision of the FtTJ involved the making of an error on a point of law.

Discussion:

17. The grounds of challenge are succinctly stated in 6 paragraphs. Paragraph 2,3 and 5 refer to the assessment of the evidence by the FtTJ. Paragraph 1 refers to the failure to consider the appellant's solicitors representations on the issue of whether the appellant's claim fell within a

Convention reason namely a particular social group ("PSG"). Paragraph 4 concerns the assessment of article 8.

18. I shall consider paragraphs 2, 3 and 5 which concern the assessment made of the evidence by FtTJ Ali. It is submitted on behalf of the appellant that the FtTJ heard in his assessment between paragraphs 45 – 47 and paragraph 49 of his decision. Mr Rashid submits that the FtTJ heard in not accepting the appellant's evidence as to the nature of her relationship with her husband and that it had been violent and that there had been unwanted pregnancy.

19. The written grounds assert that "the appellant's reasoning for the actions or inactions taken by her on this issue are, it is submitted, rational and understandable considering her circumstances and especially since she was in fear of her then husband. This naturally prevented her from contacting the police in relation to the abuse she was suffering. The appellant was facing in this regard, and this coupled with the fear resulted in her being unable to disclose this." The fact that there was an unplanned/unwanted pregnancy (fact which the respondent initially rejected) supports the case in the circumstances she presented in her oral and written evidence. The FtTJ criticises the appellant at paragraph 47 as her medical records did not reference any disclosure made her GP in relation to mistreatment being received by her ex-husband. The FtTJ again did not take into consideration the distressing time "

20. The written grounds at paragraph 3 challenge the FtTJ's assessment of the written affidavits provided in support of appeal. The grounds submit that at paragraph 49 of the decision the FtTJ criticises the affidavits provided in support of the appellant's appeal. It is submitted that these are provided in good faith and were accurate at the time. The FtTJ erred in law by attaching no weight to them.

21. Mr Rashid submitted that the grounds were self-explanatory, and the inconsistencies found by the judge were minor consistencies. He submitted that the FtTJ in reaching his conclusions failed to consider that the respondent accepted the appellant's account as to how she met her husband and that they were married and were in a relationship. He submitted that the appellant's evidence before the FtTJ was that she was trying to make the marriage work but was in a difficult position. Mr Rashid pointed to paragraph 47 and the FtTJ's assessment that the appellant failed to provide medical evidence concerning the problems relating to her husband. He submitted that it was originally disputed by the respondent that she had not fallen pregnant, but the documentary evidence supported this. He submitted that the FtTJ's findings as to credibility were flawed as the judge failed to take into account all the circumstances including the evidence of a pregnancy and that she had given a consistent account as to the marriage.

22. Mr Diwnycz by way of response submitted that the FtTJ gave reasons for not accepting the appellant's account as to events and about her

relationship with her husband and that the findings were rationally open to the judge to make.

23. When considering the grounds and the submissions made by Mr Rashid on behalf of the appellant it is important to read the decision of the FtTJ in its totality. The FtTJ set out the appellant's claim in his decision between paragraphs 10 – 17. It is not suggested that the FtTJ inaccurately recorded the factual claim. At paragraph[17] the FTT J recorded the core of the appellant's case that on return to India she feared that her husband would harm her because he did not accept the separation and divorce and also that she feared her aunt's family due to close links with her ex-husband. In the accounts the appellant stated that she had been harassed by him in the UK (see paragraph 14).

24. When considering the appellant's factual account, the FtTJ was plainly aware that the respondent accepted that she had been in a relationship with S and that she had married him (see paragraph [21]) but also for the reasons set out in the decision letter the respondent did not accept that the appellant had problems within her marriage or that she has suffered violence from her husband or would be at risk on return on the basis claimed (see paragraphs 22 – 25). Notwithstanding Mr Rashid's submission, a judge may accept part of the appellant's account but not accept other parts of the account and provided that there is adequate reasoning for doing so, that is part of the assessment of the evidence.

25. When considering the core aspects of the appellant's account which were not accepted, the FtTJ undertook an assessment of the evidence between paragraphs 45 – 52. The FtTJ considered the evidence provided in support of her claim at paragraph [46] and found that there was an absence of supportive evidence in respect of her account as to her husband's conduct towards her. Whilst the grounds assert that the FtTJ failed to consider the appellant's circumstances and that she was in fear of her husband and this naturally prevented her from contacting the police, a careful reading of paragraph [46] did acknowledge the difficulties that arise in cases of domestic abuse and did not reject her accounts only on that basis. The FtTJ considered the appellant's account that she had spoken to her friend concerning her husband's conduct and that she was going to report it to the police. In the light of that evidence given by the appellant, it was rationally open to the FtTJ to find that if that had been the case, the appellant could have asked her friend to have provided evidence in support of her claim.

26. The second point made in the written grounds and relied upon by Mr Rashid in his oral submissions was that the appellant's account was that there was an unplanned/unwanted pregnancy and there was evidence at page 157 in the medical notes and that the FtTJ did not take account of the distressing time that the appellant was facing and coupled with the fear resulted in her being unable to disclose her husband's conduct towards her.

27. At paragraph [47] the FtTJ considered the medical evidence provided. Contrary to the grounds, he did take into account page 157 and the entry made on 20 June 2014. He recorded "history unplanned unwanted pregnancy 5 weeks" and considered the submission made by Mr Rashid that the only reason why a person in the appellant's position would consider such a procedure will be because she was being forced to do so. The FtTJ considered that submission but rejected it for the reasons given at paragraph [47] and that whilst he accepted there had been a reference to an unwanted or unplanned pregnancy, there was no other evidence to corroborate the appellant's account that any action was taken as a result of force or coercion. In reaching that conclusion the FtTJ took into account the appellant's medical records disclosed in the respondent's bundle between pages 155 – 231 noting that the 1st entry was made approximately 2012 with the last entries in 2019. He described the evidence as "the voluminous nature of medical records" which were over a period of 7 years. The judge found that there were no entries within the records of any disclosures made of domestic abuse or any conduct of a threatening nature towards the appellant from her husband. There is reference made in 2019 to anxiety and "overthinking, unemployed and getting divorced and living alone". The records relate to a number of appointments made and medical conditions that the appellant sought help for during her residence and over that period of time and there are no disclosures made in any of those appointments as the FtTJ found. The point made by the FtTJ was that notwithstanding the factual claim, the medical history provided no supportive evidence and the absence of our explanation as to why no disclosures were made, he considered this evidence undermined that factual claim.

28. The FtTJ did not confine his consideration to that and properly considered other evidence relied upon by the appellant. At paragraph [49] the FtTJ considered the 3 affidavits provided from the appellant's mother, a family friend and her brother-in-law. They were set out in the respondent's bundle and the appellant's bundle (see page 59 – 67). When looking at the documents they appear to be incomplete, but they are in the same format in both the respondent's bundle when they were first provided as they are in the appellant's bundle.

29. The grounds assert that the affidavits were provided in good faith and were accurate. Mr Rashid submitted that the FtTJ erred in law by attaching no weight to them and giving no reasons as to why he rejected them.

30. However the FtTJ gave his reasons for attaching no weight to the affidavits in his assessment made at paragraph [49]. He was entitled consider the affidavits in the context of the evidence as a whole and the matter of weight to be attached to the statements was a matter for the FtTJ. Contrary to the grounds, he considered the contents of the letters and gave a number of reasons as to why he found the contents to be inconsistent with the appellant's evidence and the factual account.

31. Firstly, all the statements refer to the appellant's husband only marrying her with the "sole motive of grabbing her property by fraud." The FtTJ found that that was not a matter advanced by the appellant. Whilst Mr Rashid referred the tribunal to paragraph 8 and paragraph 13 of her witness statement, neither of those 2 paragraphs are factually supportive of the core assertion made in the witness statements that "the sole motive was to grab property by fraud". Secondly, the FtTJ also found that the appellant's mother statement suggested that after returning to India and her marriage to her husband "they" went to stay with the appellant's family. The judge found that that was inconsistent with her claim that the family did not want anything to do with her because husband was of a different caste to her and on return to India she did not go anywhere as the husband left her in a hotel room (see paragraph 12 of the decision).

32. It was also open to the FtTJ to conclude that the affidavits were almost identical in nature. That is supported by the appellant's mother's affidavit at paragraph 1 – 2 and the brother-in-law's affidavit paragraphs 2 and 3. The FtTJ also took into account that there was no evidence, photographs or otherwise, to link the statements with the named individuals.

33. Consequently the grounds do not demonstrate that those findings were not open to the FtTJ to make on the evidence before him.

34. The grounds do not challenge paragraphs 48, 50, 51 and paragraph 52. Those paragraphs also set out the factual findings made by the FtTJ.

35. At paragraph [50] the FtTJ considered the section 8 issue and found from the evidence that if the appellant had been in genuine fear of her husband it would have been reasonable for her to have taken steps to claim asylum at an earlier stage rather than upon being detained. He considered a failure to do so when making earlier applications and claims damaged or undermined her credibility. These issues were set out in the decision letter at paragraph 56. The appellant had made applications to the respondent in 2018 and made an application on compassionate grounds that she needed to remain in the UK to undertake a civil case against the University and did not want to return to India without completing studies. The respondent considered that this was a completely different reason than that given in her claim now and that a failure to raise a protection claim when she could have done so and given that her problems were ongoing since 2014 undermined her account.

36. The immigration history of the appellant is set out at paragraph 59 of the decision letter and that she did not claim asylum until her detention on 24 November 2018. That explanation of the delay was that she was waiting for a response from the Home Office (question 276), but this was not considered to be a reasonable explanation for failing to apply on protection grounds if this were the factual circumstances appertaining to her claim. The appellant later stated that she did not claim earlier as threats started after detention. However her account was that he had been abusive towards her in 2014.

37. The FtTJ's finding at [50] are in accordance with the correspondence from her previous solicitors exhibited at E1 RB dated 30/1/2018 setting out the appellant's circumstances and referring to "family life with her husband was disturbed by the unfair decision made by the University to unreasonably withdraw her CAS. Her husband got frustrated and left the country and separated from the applicant. There is nothing left in India for our client after she had been separated from her husband." There was no reference to allegations made of marital misconduct within those representations consistent with the factual claim made.

38. The grounds also do not challenge paragraph [48]. The FtTJ found that the appellant's claim to have initiated divorce proceedings in the UK and that on return to India she feared her husband because he did not accept the separation and/or divorce, was not supported by any evidence. He found that while she had claimed to have initiated divorce proceedings she provided no evidence of having done so. Given that this was a central feature of the factual claim, it was open to the FtTJ to find that she had not provided evidence of this, and such evidence could reasonably be expected to have been produced.

39. The grounds also do not seek to challenge paragraph [52]. In that paragraph the FtTJ considered in the alternative that if he accepted that she had had problems in the marriage, he would not have found her to be at risk on the basis that she had stated that he had connections with powerful people. The FtTJ set out his reasoning as follows. The appellant had failed to provide any information about what gang he belonged to, what connections he had, if any and what influence those alleged connections had. This was based on the evidence that the appellant given an interview and as recorded in the decision letter between paragraphs 53 and 54. The FtTJ also found that her account of her husband's influence was undermined by the fact that having returned to India 8 years ago, her husband had failed to carry out any physical threats against her family. The FtTJ also rejected the evidence that her brother would not assist her in the light of the evidence that he had worked for the police.

40. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. There is a need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in *AE (Iraq)*. Warby LJ recalled the judgment of Floyd LJ in *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095 at [19]:

> "... although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter.

41. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised

by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 in these terms, per Lewison LJ:

> "2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

42. In conclusion, the grounds at paragraphs 2, 3 and 5 amount to no more than a disagreement with the assessment of the evidence and the factual findings made by the FtTJ. The judge made findings of fact supported by reasoning and it has not been established that those findings were flawed nor that they were outside the range of findings reasonably available to the FtTJ on the evidence or were perverse, irrational or based on a misunderstanding of the evidence. The disagreement with the weight that the FtTJ gave to the evidence as suggested does not establish a material error of law.

43. Paragraph 1 of the grounds submits that the FtTJ erred in law at paragraph [44] by rejecting the appellant's case that her circumstances engaged the Refugee Convention and whether she fell under the category of a Particular Social Group ("PSG").

44. The basis of that submission is that the judge failed to consider the appellant's representations set out at pages 133 – 142 of the respondent's bundle (for the asylum claim).

45. The difficulty with the submission is that the FtTJ's assessment of the evidence led to his conclusion whereby he had rejected the core aspect of her account that she would be at risk of serious harm or persecution on return to India. Therefore as that had not been established, she could not demonstrate that she met the Refugee Convention, whether or not the circumstances fell within a PSG. Therefore any error in not considering the appellant's representations is immaterial to the outcome.

46. The last ground, paragraphs 4, -6 to challenge the article 8 assessment. It is submitted that the FtTJ did not adequately consider the appellant's article 8 claim and that she had resided in the UK for a significant period of time in which she developed deep-rooted ties to British society. It is submitted by Mr Rashid that she worked in the care sector throughout the pandemic and that the judge failed to have regard to this, and it was a significant aspect of her private life.

47. The FtTJ undertook the article 8 assessment between paragraphs 53 and 54 of his decision. The first issue raised in the skeleton argument (see paragraphs 5 and 6) set out that the appellant had been employed in the UK, contributed to the economy, and provided a much-needed service for the vulnerable and the elderly and that she continue to be employed. It was further submitted that there were insurmountable obstacles to the appellant's family life continuing abroad; that she was settled in the UK that the appellant's sister relied upon her for emotional and practical support.

48. The FtTJ considered the family life aspect of the appellant's claim at paragraph [53] and the claim that her sister was dependent on her. The FtTJ set out that there was no evidence, concerning any dependency nor had there been any witness statement from her sister in support of the claim therefore it was not established there was any real dependency that went beyond normal emotional ties.

49. At paragraph [54] the FtTJ addressed the other issues raised under paragraph 276 ADE(1) (vi) and whether there would be significant obstacles on return to India. The FtTJ found that she could not meet the immigration rules to private life. The FtTJ was plainly aware of the length of residence in the UK given his recitation of immigration history within the claim. The FtTJ also found that they would not be very significant obstacles to integration to India having found that she had lived in India for the majority of her life including her key formative years, had been educated

then it worked as a teacher/teaching assistant. The judge found that she retained language ties and the familiarity of lifestyle and culture of India. He found that was evidenced by the fact that she travelled between the UK and India and that she had family that she could return to who could offer support and accommodation. He took into account her work history and her qualifications and concluded overall that there were no very significant obstacles to her integration. The FtTJ when considering this was required to carry out a "broad evaluative judgment" and those were factual findings consistent with the decision in The Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813.

50. The FtTJ further found that those findings overlapped in the claim under article 8 which I take to mean that he took into account those findings when reaching the conclusion that the decision to refuse leave was not disproportionate. The FtTJ was aware of the length of residence in the UK but on the facts of the appeal the appellant's private life in the UK had accrued when her status was precarious and thus little weight would be given to her length of residence. The other considerations such as speaking English was a neutral matter and did not positively act as a factor in favour of the appellant.

51. Whilst the FtTJ did not expressly refer to her work as a carer during the pandemic, the skeleton argument referred to the appellant being in the UK and contributing to the economy. Again whilst that demonstrated that the appellant was financially dependent that was also a neutral matter (see decision in Rhuppiah v SSHD[2018] UKSC 58).

52. On the evidence before the FtTJ it is not disputed that she been employed as a carer during the pandemic (see paragraphs 26 and 31 of her witness statement). However as explained in the decision of Thakrar [2018] UKUT 336, the public interest in immigration control is only likely to be reduced by a contribution which is "very significant" and that the question directly relates to immigration control (see paragraph 112). Without wishing to minimise the appellant's work during the pandemic, there was no supporting evidence as to any significant contribution made and the evidence before the FtTJ did not establish that any weight attached to that was sufficient to demonstrate that the decision reached was disproportionate or would result in unjustifiably harsh consequences in the light of the other factors identified by the FtTJ in his decision overall.

53. Consequently for the reasons given, the decision of the FtTJ did not involve the making of a material error of law and the decision to dismiss the appeal stands.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

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 her. 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 Upper Tribunal Judge Reeds

Dated 3 November 2022