



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

**Appeal No: UI-2022-000019
HU/50535/2021; IA/02380/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On 21 November 2022
Prepared on 22 November 2022**

**Decision & Reasons Promulgated
On the 3rd January 2023**

Before

**UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

Between

**MS TASNEEM KOUSAR
(Anonymity order not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karim, Counsel instructed by AWS Solicitors
For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The Appellant is a citizen of Pakistan born on 16 November 1962. Her appeal against a decision of the Respondent dated 16 February 2021 was dismissed by Judge of the First-tier Tribunal Moffat sitting at Hatton Cross on 7 October 2021. The Appellant appeals with leave against that dismissal. The Appellant had applied on 3 June 2020 for leave to remain on compassionate grounds under Article 8 outside of the Rules. It was the refusal of that application on 16 February 2021 which gave rise to these proceedings.

The Appellant's Case

2. The Appellant argued that there were very significant obstacles to her integration in Pakistan. She was divorced from her husband at whose hands she had suffered domestic violence and now had no family in Pakistan. She would be vulnerable as a lone woman. She suffered from psychiatric problems as detailed in a report from a psychiatrist, Dr Bedi and would require assistance with her care if returned. Of her two daughters, one lived in the United States and the other lived in the United Kingdom. Neither would be able to assist in her care in Pakistan. When the matter came before Judge Moffat the Appellant was present but did not give evidence. The Judge noted that there was no medical evidence to indicate the Appellant was unfit to testify and instead heard evidence from the Appellant's daughter, Mrs Malik ("the sponsor").

The Decision at First Instance

3. The Judge decided that many of the matters in issue in this case were previously considered by Judge of the First-tier Tribunal O'Garro in a determination promulgated on 4 March 2020 under case number PA/10114/2019. Judge O'Garro found that the Appellant had family in Pakistan, including her mother and siblings, to whom she could return. At [62] of her determination Judge Moffat held that there was nothing new before her to require her to depart from Judge O'Garro's findings. In particular at [65] the Judge stated that the Appellant had not served any corroborating evidence, despite it being readily available, to establish that the youngest daughter, Mrs Mehwish, was now living in the United States as opposed to Pakistan.

The Onward Appeal

4. In grounds settled by Mr Karim who had appeared at first instance it was argued that there had been procedural unfairness during the hearing as a result of which the decision of the Judge should be set aside and the matter remitted back to the First-tier for a rehearing. This allegation centred on exchanges between counsel for the Respondent and the Judge during the first instance hearing. The Respondent had sought to cross-examine the sponsor on whether there was evidence that Mrs Mehwish, the Appellant's youngest daughter was in fact in the United States. This

cross examination had been stopped by the Judge who said: "I don't think that's one of the issues that was taken issue with in the refusal letter". This gave the impression, the Appellant argued, that the Judge accepted that Mrs Mehwish's whereabouts were no longer in issue in the case. Had the Appellant known that the Judge might take the view that it was not accepted that Mrs Mehwish was in the United States, the Appellant would have sought to adduce further evidence to show Mrs Mehwish was there.

5. Later in the hearing there was an exchange between the Judge and counsel for the Respondent during closing submissions when the Judge had again indicated that Mrs Mehwish's whereabouts were not put in issue in the refusal letter. The Judge stated: " [I]f that wasn't [written] in the refusal letter then there would have been no need for the Appellant to have adduced evidence to refute that because this would be the first time that they would have heard that that was an issue that you were raising, that it wasn't accepted that her [daughter] has emigrated to the United States I don't think it's ever been raised that the Respondent says that the [daughter] has never gone to the United States. I didn't think that was an issue". As a result counsel for the Appellant did not deal with the matter in closing for example by way of reply. There were other matters raised in the grounds of onward appeal such as the Judge's treatment of the expert evidence of doctor Bedi but for the reasons which we give below it is not necessary for us to consider those further grounds.
6. Permission to appeal was initially refused by the First-tier Tribunal on the grounds that the appeal amounted to no more than a disagreement with the result. The grounds were renewed to the Upper Tribunal which found it arguable that there had been a procedural error. As this issue related to what had been said in court a transcript of the recording of the hearing was obtained and was before us.

The Hearing Before Us

7. The Respondent argued that although the Judge had referred to the absence in the refusal letter of any objection to the claimed whereabouts of Mrs Mehwish it was the case that the Respondent's review dated 9 August 2021 (two months before the hearing before Judge Moffat) had taken issue with the claim that the Appellant's younger daughter was in the United States. The review stated: "If the Appellant's younger daughter has emigrated to the United States (10 70AB) - bearing in mind the Appellant has previously been found to not be credible - it is reasonable and expected that cogent evidence of this is provided by the Appellant." The Judge was aware of the review, see [18] of the determination but neither counsel referred to it during the hearing.

Discussion

8. A core issue in this case was the credibility of the Appellant and her witness, the sponsor. Judge O'Garro had made adverse findings against the Appellant on credibility generally but specifically whether the

Appellant had family in Pakistan who could help her upon return. The Judge indicated in her determination that she had seen nothing which would cause her to take a different view to Judge O'Garro who found that there were family members in Pakistan. At [60] the Judge had said: "to depart from that finding, there would need to be evidence before me which was not available at the date of the last appeal on 4 February 2020".

- 9.** This contradicted the impression given in court that the Appellant's credibility on the whereabouts of her youngest daughter was accepted by the Tribunal because it had not been challenged by the Respondent. It was unfortunate that counsel for the Respondent did not remind the Judge of the contents of the Respondent's review. It was however procedural unfairness to give the impression that the issue of the youngest daughter's inability to help the Appellant on return to Pakistan was no longer a live issue when as it turned out from the determination it was very much a live issue because a finding was made against the Appellant on the point.
- 10.** In our view this error infected the Judge's findings. Given the nature of the procedural unfairness we are of the view that the determination itself cannot stand. The matter needs to be looked at afresh by a differently constituted First-tier Tribunal. Although some of the remaining points made in the grounds of onward appeal may have more force than others it is not necessary for us to consider those remaining matters since the determination falls to be set aside because of the procedural unfairness we have found in the determination which renders the hearing a nullity.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside. We direct that the appeal be remitted back to the First-tier Tribunal to be reheard de novo by a different Judge.

No anonymity order was made in the First-tier Tribunal and we also make no anonymity order as there is no public policy reason for so doing.

Signed this 22 November 2022

Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT

FEE AWARD

As we have set aside the decision of the First-tier Tribunal we also set aside the decision that there should be no fee award. That matter remains outstanding before the First-tier at the renewed hearing of the appeal.

Signed this 22 November 2022

Judge Woodcraft
Deputy Upper Tribunal Judge