IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001293
UI-2023-001292
First-tier Tribunal No:
PA/52129/2022 PA/52130/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 October 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

PW
AY
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr F Ansari of Riverway Law
For the Respondent:	Mr S Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 23 June 2023

DECISION AND REASONS

Anonymity Order:

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellants or members of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the Appellants seek international protection and so are entitled to privacy.

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Introduction

1. The Appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Herlihy ("the Judge"), promulgated on 23 March 2023.

Factual background

2. The First Appellant is a national of India and the Second Appellant is a national of Pakistan. They are in a relationship, having met in December 2009 whilst in the UK. They have a child together, born in 2018, who is Pakistani by birth. The First Appellant entered the UK as a student in 2008, with leave valid until 31 January 2010. The Second Appellant entered the UK as a student in 2008, with leave valid until 19 April 2013. On 26 June 2019, both Appellants made protection and human rights applications arising out of the fact of their relationship (namely their different nationalities and religions) and their having a child outside of marriage.

3. On 25 May 2022, the Respondent refused both applications and it is these decisions that were the subject matter of the appeal before the Judge. In refusing the applications, the Respondent took as her starting point, for both the protection and human rights aspects of the claims, the earlier decision of First-tier Tribunal Judge Flynn ("Judge Flynn"), promulgated on 2 December 2015.

4. In that earlier decision, Judge Flynn had dismissed the Appellants' appeals on the ground that the refusal decision was not a disproportionate interference with their right to enjoy family life under Article 8 of the European Convention on Human Rights ("ECHR"). Judge Flynn stated that the issue to be determined was "whether it would be reasonable to expect either Appellant to accompany the other to their country of origin in order to maintain the relationship; or whether doing so would threaten their physical or moral integrity. [The Appellants' Counsel] conceded that there is insufficient evidence to show a breach of their rights under Article 3 and I agree with him" [64]. Judge Flynn found, inter alia, that:

   (1) "… the Appellants could not live safely in Pakistan unless one of them converted … they cannot be required to do this and therefore I accept that they cannot go to Pakistan, even if they marry" [73].

   (2) "I do not find it reasonably likely that there would be a real risk for the moral or physical integrity of either Appellant in India, so long as they do not try to settle in a rural area. I consider it reasonable for them to relocate to a heavily populated area" [74].

5. The issues be determined at the hearing before the Judge were agreed between the parties. Those issues were, in respect of the First Appellant, whether:

   (1) he is at risk of persecution from the Indian authorities on the basis that he will be perceived to be anti-national or a Pakistani spy by reason of his relationship with the Second Appellant;

   (2) he is at risk of persecution from right-wing Hindu nationalist extremist groups on the basis that he will be perceived to be anti-national or a Pakistani spy by reason of his relationship with the Second Appellant;

(3) if returned to India, his partner and child will be unable to obtain visas to join him on a permanent basis or at all.

In respect of the Second Appellant, whether:

(1) she is at risk of persecution on the basis of her returning to Pakistan as a person who has had a child outside marriage, is in an inter-faith relationship with an Indian Sikh, will be returning alone with her child and will have no family support;

(2) she is at risk of persecution on the basis of her being perceived as being supportive of India or an Indian spy by reason of her relationship with the First Appellant;

(3) if returned to Pakistan, her partner and son will not be able to secure visas to join her on a permanent basis or at all.

Decision of the Judge

6. In respect of the First Appellant, the Judge found, inter alia, that he did not genuinely fear persecution in India on the basis of his inter-faith relationship [35] and nor was there a real risk of persecution arising out of his relationship with the Second Appellant [38].

7. In respect of the Second Appellant, the Judge found, inter alia, that she did not genuinely fear persecution in Pakistan as a consequence of her inter-faith relationship [44] and she would not be at risk of persecution on return to Pakistan, whether she returned alone or with her son [47, 48].

8. In respect of family life, the Judge found that family life could not continue in Pakistan but that that it could continue in India [61].

Grounds of appeal and grant of permission

9. The grounds, which we have re-numbered, plead that the Judge erred in that:

(1) She failed to make a finding on a material matter, namely whether the Second Appellant is at risk on return from the wider community (as opposed to her family) [ground 1(i)].

(2) The conclusion that the Second Appellant would not be at risk if she returned to Pakistan alone is irrational in light of the acceptance that she would be at risk if she returned to Pakistan with her husband [ground 1(ii)].

(3) In finding that the Second Appellant would not need to disclose her relationship with the First Appellant on return to Pakistan, she failed to apply the judgment of the Supreme Court in HJ (Iran) [2010] UKSC 31 [ground 1(iii)].

(4) In finding that the First Appellant would not need to disclose her relationship with the First Appellant on return to Pakistan, she failed to take into account material evidence [ground 1(iv)].

(5) In finding that the Appellants had not "made any real or concerted attempt "[36] to have their child registered as a citizen of India or Pakistan, she reached an irrational conclusion and/or failed to take into account material evidence [ground 2].

(6) In finding that the Appellants could apply for Indian nationality for their child [59], she reached an irrational conclusion and/or failed to take into account material evidence [ground 3].

(7) She failed to give adequate reasons for dismissing the protection element of the Appellants' cases and/or erred in treating Judge Flynn's Article 8 decision as the starting point for the Appellants' protection appeals [ground 4].

(8) She took into account an irrelevant consideration in the assessment of the protection cases, namely the fact that the Appellants are not married and/or gave undue weight to this factor [ground 5(i)].

(9) She failed to make a material finding, namely whether the Second Appellant is at risk of persecution because of her membership of a particular social group [ground 5(ii)].

(10) She failed to take into account relevant evidence and/or gave inadequate reasons in finding that the First Appellant would not be at risk in India as a result of his inter-faith relationship [ground 5(iii)].

(11) She reached an irrational conclusion and/or gave inadequate reasons for finding that the Appellants had not taken steps to marry [ground 6].

(12) In finding that family life could continue in India, she reached an irrational conclusion and/or failed to give adequate reasons and/or failed to take into account relevant evidence [ground 7(i)].

(13) She failed to consider/apply the decision of the Upper Tribunal in CS and Others (Proof of foreign law) India [2017] UKUT 00199 [ground 7(ii)].

10. The Respondent did not file a rule 24 response.

11. Permission was granted by First-tier Tribunal Judge SPJ Buchanan on 2 May 2023. The grounds upon which permission was granted were not restricted.

Upper Tribunal hearing

12. We heard oral submissions from both advocates. During the course of this decision, we address the points they made.

Discussion and conclusion

13. There is a significant degree of overlap between the various grounds of appeal. We begin our analysis by considering matters relevant to the Judge's findings in relation to the objective risk of persecution in respect of the Second Appellant and then turn to those matters relevant to the assessment of the objective risk in respect of the First Appellant. Finally, we address those grounds relevant to the Judge's credibility findings and her conclusion in relation to Article 8.

14. Broadly, the grounds plead that the Judge failed to make material findings, failed to take into account relevant evidence, gave inadequate reasons and reached irrational conclusions.

15. We remind ourselves of the judgment of the Court of Appeal in Simetra Global Assets Limited v Ikon Finance Ltd & Others [2019] EWCA Civ 1413 at [46]:

> "First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a Judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a Judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

16. The Judge found:

> "I am not satisfied that the [Second Appellant] has established to the lower standard of proof that she will be at risk of suffering ill-treatment on her return to Pakistan. In her oral evidence [the Second Appellant] said she had not been threatened in Pakistan as she knows no one in Pakistan. She said that if she were to return to Pakistan, she would have to conceal her relationship and that she would be visible to everyone. However, I do not find it credible that [the Second Appellant] would choose to disclose her relationship with [the First Appellant] if she seriously thought this would put her at risk. If the [Second Appellant] were to return to Pakistan alone while she awaited the grant of a visa to join [her partner] and their son in India, I do not find that she would be at any risk of persecution and I find it reasonable not to disclose information about her relationship which would put her in danger" [46]
>
> In considering the totality of the evidence before me, I am not satisfied that [the Second Appellant] has established that she would be at risk of persecution on her return. She has not claimed to have received threats from anyone in Pakistan. I am further satisfied that [the Second Appellant] will be able to return to Pakistan and live as she has done in the past without any risk of persecution. I am satisfied that she would be able to live safely both in her home area and outside her home area and I do not find it would be unduly harsh to expect her to do so. Pakistan is a very large country with a population of over 187 million people and it is not credible that anyone would have any motivation or resources to locate her … [48]
>
> I am not satisfied that the [Second Appellant] has demonstrated that the authorities in Pakistan would be unwilling to offer sufficiency of protection [49]."

17. In making her findings, the Judge did not distinguish between the two separate limbs of the Second Appellant's case nor did she address the individual personal characteristics of the Second Appellant that are said to give rise to a risk on return. Whilst the Judge did conclude that the Second Appellant would not be at real risk of persecution on return to her home area, we find, for the reasons set

out below, that she failed to make material findings of fact and failed to give adequate reasons for reaching her ultimate conclusion. It was particularly important in this case to be clear about the reasons for this conclusion because the Respondent did not set out, in either the refusal decision or the review document, why the Secretary of State was of the view that there was no risk to the Second Appellant in her home country (instead focussing on the risk in India).

18. The Judge did not make a clear finding as to whether the Second Appellant would face a risk from the wider community, as opposed to family members. The finding at [46], in relation to the Second Appellant not needing to disclose her relationship with the First Appellant, is made in the context of the Judge's assessment of the credibility of the Second Appellant's assertion that she is in fear; it is not a finding by the Judge that the Second Appellant would be at risk if members of the community became aware of one or more of the Second Appellant's characteristics. We are reinforced in this view by the Judge's finding at [48] that "it is not credible anybody would have any motivation or resources to locate her".

19. Even if the Judge was intending to convey that she was assessing the alternative scenario, namely that there is a risk from the wider community but that the Second Appellant could choose not to disclose relevant personal characteristics, such a conclusion is tainted by a lack of reasons because the Judge has not (i) identified which characteristics place the Second Appellant at risk (ii) stated which of those characteristics the Second Appellant could be expected not to disclose (iii) considered the relevance of the fact that the Second Appellant would be returning with a child but without the father of the child and (iii) not given any reasons for not accepting the unchallenged expert evidence of Dr Holden about those factors which the Second Appellant would have to disclose in order to secure the appropriate identification documents for her child on return to Pakistan. We therefore conclude that the Judge erred as pleaded in Grounds 1(i), 1(iv), 4 and 5(ii).

20. In relation to ground 1(ii), we see no irrationality because the ground is based on a false premise, namely that Judge Flynn's finding in relation to Article 8 is determinative of the question of risk on return. As Mr Whitwell rightly points out, Judge Flynn was conducting a very different exercise: he was assessing the feasibility of the relationship continuing in Pakistan, not the question of whether the Second Appellant would face a risk of persecution/serious harm. In relation to ground 1(iii), as the Judge made no specific findings in relation to risk factors, we do not need to determine this ground of appeal.

21. Turning to the First Appellant, Mr Gazzain submitted that, in finding that the First Appellant did not face a real risk on return to India, the Judge failed to take any account of the expert report of Dr Holden. Mr Whitwell submitted that the Judge specifically stated that she had considered the report and, whilst the Judge could have referred to the evidence in more detail, it is not an error of law for her to not do so.

22. The Judge's findings and reasons are set out at [38]. The Judge stated that she had "carefully considered the report of the expert and the objective reports". In terms of the evidence analysed, the Judge quotes from the relevant Country Policy and Information Note but makes no reference to the contents of the report of Dr Holden, despite that report dealing at length with the question of risk in

India. The report was a material piece of evidence upon which the First Appellant relied and dealt with a core issue in the appeal. It is evidence that should have been addressed and it is an error of law not to have done so. It cannot be said that that the matters within Dr Holden's report are not capable of having any effect on the overall assessment of risk and we therefore conclude that the error is material. We find that the Judge erred as pleaded in grounds 4 and 5(iii).

23. Grounds 2, 3, 5(i) and 6 plead errors in the Judge's approach to the assessment of the credibility of both Appellants' claimed fear of returning to their respective home countries.

24. At [45], the Judge stated:

> "I find that [the Appellants'] credibility … further undermined by the inaction in trying to overcome any legal obstacles that [they] claimed that they have in living in India. Is (sic) clear that neither of them had made any serious and realistic attempt to register their son as a citizen of either India or Pakistan at the time of the asylum claims … I find that it is more likely than not that [the Appellants] have contrived by their inaction to seek to remain in the United Kingdom and prevent removal because they wish to remain to continue their relationship in the United Kingdom and not due to a genuine fear of persecution."

25. At [50] the Judge found that the Appellants had taken "no steps" to marry or enter into a civil marriage and took this into account in dismissing the protection appeals.

26. The Appellants adduced documentary evidence in in support of their account of their efforts to have their child registered in India/Pakistan and in relation to the steps they had taken to marry. For example, they adduced (i) a transcript of the recording of conversations between the Second Appellant and the Pakistani High Commission (ii) emails between the First Appellant and the Indian High Commission (iii) evidence from Dr Holden corroborating the Appellants' accounts of their interactions with the respective High Commissions and (iv) extracts from the relevant UK government website in relation to the criteria to be satisfied in order to marry/enter into a civil partnership. Mr Gazzain submitted that, in light of this evidence, the Judge's conclusions are unsustainable. Mr Whitwell submitted that the complaint was, in effect, no more than a disagreement with findings the Judge was entitled to make.

27. In our view, the Judge has erred by failing to give adequate reasons for her conclusions. The Judge relied upon these findings to support her conclusion about the Appellants' credibility and, in turn, her ultimate conclusion in relation to the protection issues. It was therefore incumbent on the Judge to explain why the evidence adduced by the Appellants was either not accepted or, if accepted, nonetheless led her to make the findings that she did. To that extent, we conclude that that the Judge erred as pleaded in grounds 2, 3, 5(i) and 6.

28. Given our conclusions in relation to the protections claims, it follows that these errors infected the Article 8 conclusions and we therefore conclude that the Judge erred as pleaded in ground 7(i). We note, however, that there is no merit in ground 7(ii). As is apparent from the case citation, this ratio of this decision of the Upper Tribuanal is irrelevant to the issues before the Judge and the factual comparison Mr Gazzain invited the Judge to make was of no value.

Notice of Decision

29. The decision of the First-tier Tribunal involved the making of a material error on a point of law and so we set aside the decision.

30. We conclude that the appropriate forum for the necessary further hearing of this appeal is the First-tier Tribunal (not to be listed before First-tier Tribunal Judge Herlihy) because the nature of the errors is such that no findings of fact can be preserved. In reaching this decision, we apply paragraph 7.2 of the Senior President's Practice Statement and take into account the oral submissions of both advocates. Accordingly, the appeal is remitted to the First-tier Tribunal.

C E Welsh

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 October 2023