



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

Appeal Numbers:
AA/09325/2013

THE IMMIGRATION ACTS

Heard at North Shields

**Determination
Promulgated**

On 3 April 2014

Prepared 3 April 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

**U. I.
(ANONYMITY DIRECTION)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brown, Counsel instructed by Legal
Justice Solicitors

For the Respondent: Mr Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan. She entered the UK on 9 June 2011 with a valid grant of entry clearance as the dependent spouse of one with leave to remain as a Tier 4 student. Her husband is also a citizen of Pakistan.

2. On 29 March 2012 the Appellant was delivered of a child, also a citizen of Pakistan. On 31 May 2012 the Appellant's leave to remain in the UK expired without any application having been made for further leave to remain, and so she became an overstayer. On the same date the leave to remain as a Tier 4 student that had been granted to the Appellant's spouse also expired. I am told, although there is no evidence before me to that effect, that he too became an overstayer at that date.
3. On 22 April 2013 the Appellant made an application for discretionary leave to remain. On 7 August 2013 the Appellant made an application for asylum. The Appellant's case was that she faced a risk of harm from members of both her own family in Pakistan, and the family of her husband, as a result of the couple's decision to marry without the permission of their respective families. It was said that internal relocation was not a viable option, and that there was no effective state protection against that risk of harm.
4. On 18 September 2013 the Respondent refused to grant her leave to remain, and made a decision to remove her to Pakistan, having decided that the account of events upon which her asylum claim was based was untrue.
5. The Appellant's appeal against the removal decision was heard on 27 January 2014. It was dismissed in a Determination promulgated on 5 February 2014 by First Tier Tribunal Judge Duff. In the course of that Determination the Judge made a series of adverse findings of fact. He rejected as untrue the Appellant's claim that neither her family, nor her husband's family were aware of their marriage, and her claim that they had not consented to it.
6. First Tier Tribunal Judge Hodgkinson granted the Appellant permission to appeal the decision on 25 February 2014.
7. The Respondent filed a Rule 24 Notice on 11 March 2014.
8. Thus the matter comes before me.

The unchallenged findings

9. Mr Brown accepts that the Judge's findings in paragraphs 24-31 of the Determination are not the subject of any challenge in the grounds of the application for permission to appeal. Having heard evidence from the Appellant, her brother in law (the brother of the Appellant's husband) and her sister in law (the wife of the brother of the Appellant's husband), the Judge concluded that their evidence was materially inconsistent with one another, and moreover that it was not consistent with the content of the documents in evidence before him. He rejected the claim that the signatures of family members to the marriage certificate which declared their presence as witnesses to the marriage ceremony were forged. As a result the Judge rejected as a complete fabrication the claim that the Appellant had married against the will of her family, and

without the knowledge of either her own family, or the family of her husband. He found as a fact that her family did know of the marriage, that members of her family (including her mother) did attend the marriage ceremony, and that her family had approved of that marriage. He made the same findings in relation to her husband's family. In the circumstances he rejected the claim that she faced any risk of harm from either the members of her own family, or her husband's family, because of marrying without approval.

The "concession"

10. Although this does not appear to have formed part of the original application for asylum, by the hearing of the appeal it was also argued that the Appellant had been a victim in the UK of domestic violence at the hands of her husband, and that as a result she and her son faced a risk of future harm from him against which there was inadequate state protection in Pakistan. Moreover that she and her son faced a risk of future harm both from him, and from members of his family in Pakistan, as a result of the breakdown of the marriage, and in particular her report of violence to the police, which in turn had led to his arrest; by way of some form of "revenge" or "honour" attack.
11. Before the Judge was evidence in the form of a letter dated 27 November 2013 from CAF/CASS to the Principal Registry of the Family Division. (There does not appear to have been any permission granted to the Appellant to disclose this to any third party - but that is an issue for another day.)
12. The CAF/CASS letter reported following enquiries that the Appellant's husband had been the subject of a police caution as a result of a report of domestic violence made by the Appellant, that the couple had separated as a result of domestic violence, and, that the Appellant's husband was the subject of a domestic violence injunction issued by the local County Court. This CAF/CASS letter also notes that the Appellant's husband had applied for leave to remain in the UK, but did not disclose when that application was made, the basis of that application, or what (if any) decision had been made upon it.
13. It is common ground before me that at the start of the hearing of the appeal the Judge attempted to identify the issues with which he had to engage. I have been shown the contemporaneous note made by Counsel below (not Mr Brown) which records that there was to be "*no challenge that the relationship has broken down and dv*" [dv is said to be shorthand for domestic violence] and the contemporaneous note of the Presenting Officer which records "*Violence: as far as Cafcass report - Yes*". The Judge's record of proceedings contains no note of this conversation, and the Determination

does not refer to the discussion at all, or to any concession of fact that was made by the Respondent.

14. In my judgement there is plainly scope for dispute as to precisely what the Presenting Officer intended, and what precisely he thought he was conceding, and indeed what Counsel had understood him to have conceded. It is possible that the presenting officer had not really identified that for himself, but in any event there is in my judgement the very real prospect that whatever concession was being made it was inadequately identified to, or by, the Judge, with the result that there was material unfairness in the proceedings. Certainly the Determination contains no passage that suggests the Judge's starting point was a concession of fact in any terms. In the circumstances I am satisfied that the confusion leads to the risk that any concession of fact made by the Respondent was not part of the Judge's evaluation of the evidence as to what, if any, past violence or threats of violence there had been, and what risk there was of future violence.
15. In paragraph 32 of the Determination the Judge considers the prospect of the Appellant and her spouse having colluded together to make a false claim of violence, and a false admission of violence, in order that she, and he, might use that claim and that admission in order to acquire an immigration status in the UK to which they were not entitled. Depending on the terms, such a finding may well have been inconsistent with what the Appellant's Counsel understood the Respondent's concession to be.
16. It is not suggested before me that the Respondent ever advanced such a case during the cross-examination of the Appellant, or of any of the other witnesses, or in closing submissions. Nor is it suggested that the Judge alerted the parties at any stage during the hearing to any concern on his part that the evidence was inconsistent with any concession of fact that had been made.
17. In the circumstances the finding in paragraph 35 that the Appellant would be returning to Pakistan in circumstances in which she enjoyed the full support of the extended family of her spouse is in my judgement unsafe, and it must for that reason be set aside. Before me it is argued that if there was in truth genuine domestic violence and a complaint to the police that led to the husband's arrest and caution, the Appellant would be highly unlikely to enjoy the support of members of her husband's family. Indeed she would be at risk of harm from them (and from her husband himself) by way of a revenge or honour attack for the difficulties that she had caused by contacting the police. There will have to be further consideration of that argument, and the consideration of the Appellant's own evidence about the practical and financial

support she continued to enjoy from her husband's brother and wife, once there is clarity over what (if any) concession of fact the Respondent makes.

18. To that end the Respondent must reduce to writing the nature of the concession (if any) that upon reflection she makes. It is not suggested that any unfairness or prejudice will result to the Appellant if this is in reality a narrower concession than her former Counsel had understood was made (or indeed that it is the withdrawal of the concession she had understood was made), so long as the Appellant has proper notice of the extent of the concession (if any) and adequate time to prepare for the hearing: CD (Jamaica) [2010] EWCA Civ 768. The Tribunal must be put into the position of being able to decide fairly the real issues of dispute upon their merits. Thus, if it is conceded only that a report of violence was made by the Appellant, resulting in an arrest and a caution of her husband, but it is disputed as to whether any genuine domestic violence occurred, then the Respondent must say so in terms. If the account of violence that is relied upon by the Appellant is in dispute because it is not dealt with by way of formal concession then the further hearing of the appeal will need to resolve the dispute between the parties as to whether her account of domestic violence is true. Only then will the further hearing of the appeal be able to resolve any dispute as to what, if any, risk of harm the Appellant and her son face in the event of return to Pakistan, and whether internal relocation would avoid that risk, or whether the authorities in Pakistan provide adequate protection against that risk. Only then will the further hearing of the appeal be able to remake the decision upon the Article 8 appeal, which at present turns upon the Appellant's claim that she should be granted DLR in order that she might participate in the ongoing proceedings in the Gateshead County Court between herself and her husband over his ability to enjoy contact to their child.

19. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard. In the circumstances of the appeal I am satisfied that this is the correct approach. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for his case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. In any event there is inadequate time

allocated today to the hearing to permit me to go on to rehear the appeal.

20. Having reached that conclusion, with the agreement of the parties I make the following directions;

- i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal. The appeal is not to be listed before Judge Duff. The appeal is to be listed on the first available date allowing 4 hours; no interpreter is required. The appeal shall not be listed for any further CMR hearing.
- ii) The unchallenged findings of Judge Duff at paragraphs 24-31 of the Determination are preserved and shall form the starting point for the Tribunal.
- iii) The Respondent shall reduce to writing by 5pm on 22 April 2014 what, if any, concession of fact she is prepared to make as to the past history of domestic violence that is relied upon by the Appellant.
- iv) The Tribunal is likely to be assisted with evidence from the Respondent as to the current immigration status of the Appellant's husband, and whether there is any outstanding application for leave by him, and its nature, or whether it has been refused (and if so on what basis) and whether there is any current appeal before the Tribunal that has been lodged by him. The Respondent shall serve evidence on that issue by 5pm on 22 April 2014.
- v) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

21. It is common ground between the parties that the Upper Tribunal should inform the relevant Designated Judge of the Family Court of the preserved findings of fact made by Judge Duff, this decision, and the directions made in relation to the Appellant's ongoing immigration appeal. The relevant Designated Judge is Her Honour Judge Judith Moir, and that step shall be taken forthwith. No application is yet made by either party for disclosure of any documents before the Family Court.

22. I have been shown the Order made on 31 March 2014 by District Judge Kramer in current proceedings before the Gateshead County Court (FD13P01892) ["the Family Court"]. It is plain that those proceedings are at a very early stage. There is no indication in that Order that the Family Court has been given any further information about the immigration status of the Appellant, the child, or the Appellant's husband than that which is contained in the CAF/CASS letter. Both parties appear to be without representation before the Family Court. It is likely that the Family Court's case management will be assisted both by being kept informed of the progress of this

appeal and its outcome, and by being informed of the progress of any application for immigration status in the UK made by the Appellant's husband.

23. I have been asked to consider, and I have considered in the presence of both parties, whether the proper course in these circumstances is for the Family Court proceedings to be concluded before this appeal is listed for further hearing, or whether the proper course is for this appeal to be determined and for the Family Court to be informed of the outcome. I have had regard to the guidance to be found in RS (India) [2012] UKUT 218 and to the Protocol on the exchange of information between the Family Court and the Tribunal. Since there is plainly a very real issue over the honesty of the Appellant, and thus the veracity of the account she relied upon, and since it is now plain that there is a real dispute between the parties over whether the Family Court proceedings have only been commenced in order to defer the removal of the family from the UK, and since it is not in the interests of either party before the Family Court to explore that issue, and since I am satisfied that it should be possible for the Tribunal to resolve the issues of fact at the heart of the appeal well before the Family Court would be able to list a full hearing; I am not satisfied that it would be appropriate to adjourn the further hearing of the appeal to await the outcome of the Family Court proceedings.

24. In the circumstances, and having referred to the Protocol on the exchange of information between the Family Court and the Tribunal I make the following directions;

- i) A copy of this Determination, and the Determination of Judge Duff, shall forthwith be provided by the Tribunal to the relevant Designated Family Judge, Her Honour Judge Judith Moir.
- ii) The Family Court, through Her Honour Judge Judith Moir, shall be kept informed of the progress of this appeal and its outcome, and of the progress of any application for immigration status in the UK made by the Appellant's husband.

Decision

25. The Determination promulgated on 5 February 2014 did involve the making of an error of law and accordingly the decision upon the appeal is set aside. The appeal is remitted to the First Tier Tribunal with the following directions;

- i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal. The appeal is not to be listed before Judge Duff. The appeal is to be listed on the first available date allowing 4 hours; no interpreter is required. The

appeal shall not be listed for any further CMR hearing.

- ii) The unchallenged findings of Judge Duff at paragraphs 24-31 of the Determination are preserved.
- iii) The Respondent shall reduce to writing by 5pm on 22 April 2014 what, if any, concession of fact she is prepared to make as to the past history of domestic violence that is relied upon by the Appellant. If that history is not dealt with by way of concession then the further hearing of the appeal will seek to resolve any dispute between the parties as to the true nature and true extent of any past domestic violence. The further hearing of the appeal will then be able to resolve any dispute as to what, if any, risk of harm the Appellant and her son face in the event of return to Pakistan, and whether internal relocation would avoid that risk, or whether the authorities in Pakistan provide adequate protection against that risk. Only then will the further hearing of the appeal be able to remake the decision upon the Article 8 appeal, which at present turns upon the Appellant's claim that she should be granted DLR in order that she might participate in the ongoing proceedings in the Gateshead County Court between herself and her husband over his ability to enjoy contact to their child.
- iv) The Anonymity Direction previously made by the First Tier Tribunal is preserved.
- v) A copy of this Determination, and the Determination of Judge Duff, shall forthwith be provided by the Tribunal to the relevant Designated Family Judge, Her Honour Judge Judith Moir.
- vi) The Family Court, through Her Honour Judge Judith Moir, shall be kept informed of the progress of this appeal and its outcome, and of the progress of any application for immigration status in the UK made by the Appellant's husband.

Deputy Upper Tribunal Judge JM Holmes

Dated 3 April 2014