Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04058/2014
AA/04060/2014
AA/04059/2014

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport **Decision promulgated**
On: 3 February 2015 **25 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SJ, MN, MM
(anonymity direction made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr S Chelvan, Duncan Lewis & Co
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge B Lloyd in which he dismissed the appeal of the Appellants, citizens of Pakistan, against the Secretary of State's decision to refuse asylum.

2. The First Appellant and the Second Appellant are partners and the Third Appellant is their daughter. The First Appellant arrived in the United Kingdom on 3 April 2012 with leave to enter as a student valid until August 2015. The Second Appellant has been in the United Kingdom from 2002 and made an unsuccessful claim for asylum and thereafter remained without leave. The Third Appellant was born in the United Kingdom.

3. On 20 April 2014 the First Appellant claimed asylum with the Second and Third Appellant as her dependents. The application was refused on 3 June 2014. The Appellants exercised their right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Lloyd on 25 July 2014 and was dismissed. The Appellants applied for permission to appeal to the Upper Tribunal. The application was refused by First-tier Tribunal Judge Lever on 29 August 2014 but on renewal to the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge Eshun on 14 October 2014 in the following terms

> The grounds assert that (1) the judge failed to determine the free-standing state and non-state agent asylum claim based on the conceded lack of marital status and child born out of wedlock; and (2) rejected core issues on mere speculation rather than evidence. The grounds raise an arguable error of law.

The Respondent submitted a rule 24 response dated 5 November 2014 and on 13 November 2014 the Appellants' representative submitted a reply to that response.

4. At the hearing before me Mr Chelvan appeared on behalf of the Appellants and Mr Richards represented the Respondent. Mr Chelvan asked that the First and Second Appellants' second child, ZM born on 4 August 2014, be added as a dependent to the claim. Mr Richards agreed that this was the appropriate course.

Background

5. The history of this appeal is detailed above. The facts, not challenged, are that on her arrival in the United Kingdom as a student the First Appellant stayed with a family at their home in East Ham. The Second Appellant also lived at the property. The First and Second Appellant commenced a sexual relationship and within 45 days of her arrival the First Appellant became pregnant. The relationship between the First and Second Appellant continued and still continues. Their child, MM, was born on 13 January 2013. At the time of the refusal of her claim for asylum the First Appellant was seven months pregnant with her second child (referred to above).

6. The First Appellant claimed asylum on 20 April 2014. The Respondent's refusal letter summarises the basis of her claim at paragraph 3

> "Your claim for asylum is based on your fear that if you returned to Pakistan you would face mistreatment due to your having a child out of wedlock. This has led your family to threaten your life as they feel you have dishonoured them and your religion"

7. In the refusal letter the Respondent accepts that the First and Second Appellants are in a relationship (paragraph 10) and that the Third Appellant is a child of that relationship. The Respondent does not accept that this would cause the First Appellant to face any danger from her family (disregarding what can only be a typographical error at paragraph 14 of the refusal letter) because the Respondent considered that the First Appellant's family would have been aware that the Second Appellant was living at the premises where she went to stay. The refusal letter does not address the issue of any difficulty that the First Appellant may face from the Pakistani authorities or non state agents in Pakistan.

8. The notice of appeal to the First-tier Tribunal is in generic terms. The skeleton argument submitted to the First-tier Tribunal is detailed and makes it clear that the First Appellant's claim is to fear persecution not only from her family but also from the authorities because she has committed adultery which is a criminal offence in Pakistan. The skeleton argument submitted to the First-tier Tribunal refers in some detail to the expert's report from Uzma Moeen and deals at length with the potential consequences of the crime of *zina*.

Submissions

9. For the Appellant Mr Chelvan referred to the grounds of appeal. The determination does not address the issues at stake. There is no reference in the determination to the issue of state and non-state persecution outside the family. This is clearly a material error of law. The expert's report appears to be accepted by the Tribunal and the Judge specifically comments upon the expert's qualifications. No reason is given for the statement (paragraph 73) that the report is not corroborative of the First Appellant's claimed fear that she will suffer death violence or revenge from the authorities when the report is on the face of it clearly corroborative of such fear. The fact that the First Appellant is unmarried is accepted by the Respondent. The crime of *zina* is evidenced by the birth of the child. It is a Danian point.

10. So far as the second ground is concerned Mr Chelvan said that Tribunal should not rely on a hunch. The Judge is simply saying that he does not believe the First Appellant but his grounds for disbelief are pure speculation. He does not give reasons for not believing the First Appellant other than lack of corroboration. The Judge merely says that he does not believe that events would have happened as they did. This is pure speculation.

11. For the Respondent Mr Richards said that the essential evidence before the First-tier Tribunal was that the First Appellant's father was powerful in Pakistan and he would organise the prosecution and severe punishment of the adult Appellants. The Country of Origin information suggested that there had been no prosecutions mainly due to evidential difficulties. In this case the Judge found that he had been told a series of lies and he was

entitled to reach such a conclusion. The Second Appellant did not give evidence. The Judge had to take a view of the credibility of the First Appellant's evidence. He did so setting it against the background of Pakistani society at large. He was compelled to do that. He could have said that her evidence had the 'ring of truth'; instead he took the opposite view. He took the view that it was all a set up. Paragraph 76 of the determination is illustrative of this. He found based upon this that there was no possibility of adverse treatment at the instigation of the First Appellant's family. On that analysis it is difficult to establish how the Appellants would come to the adverse attention of the authorities. There was no evidence that the authorities take independent action. The findings are not speculative; all the Judge had was the evidence of the First Appellant.

12. In response Mr Chelvan said that there was no assertion by the First Appellant that her family would report her. She says she will be prosecuted and there is no evidence to suggest that she will not. Even taking out the family issue the First Appellant is a refugee. Her account is clearly not a mere fabrication. She has given birth to two children out of wedlock, if there is even a one in ten chance that she will be prosecuted she is entitled to international protection. There is a real risk.

13. I reserved my decision.

Error of law

14. The grounds of appeal to the Upper Tribunal are straightforward. The first asserts that the Judge failed to engage with what is said to be a free-standing state and non state agent asylum claim based on having children born out of wedlock. The second asserts that the Judge's credibility findings in respect of the factual basis of her claim are based on mere speculation and cannot stand.

15. So far as the first ground is concerned there can be no doubt that the issue of persecution from state and non-state agents was live before the First-tier Tribunal. This is demonstrated by the skeleton argument referred to above and also by the determination which in identifying the basis of the Appellants' claim states at paragraph 3

> "… If the Appellants now return to Pakistan the repercussions are likely to be felt not only from the First Appellant's family but from other quarters of Pakistani society including the authorities and extremists"

16. In dealing with the facts the First-tier Tribunal begins its credibility findings at paragraph 62

> "I find that all three Appellants are citizens of Pakistan. The First and Second Appellants have cohabited in the UK as partners since shortly after the First Appellant's arrival in the United Kingdom as a student on 3 April 2012. A child of the relationship, the Third Appellant MM, was born on 13 January 2013"

The Judge goes on to find in paragraph 63

> "(The First Appellant) is at the time of this appeal pregnant with her second child … the First Appellant had a sexual relationship with the Second Appellant and on her own acknowledgment within 45 days of arriving in the UK she was pregnant with her first child"

Referring later in his determination to the expert's report the Judge says

> "I acknowledge the expert report from Ms Usma Moeen as an erudite academic analysis of the law and issues relating to adultery and sexual relationships in Pakistan. I do not accept that this report is corroborative of the First Appellant's contention that she will suffer death, violence or revenge from the authorities or her family in the circumstances as we know them; namely she is in an unmarried sexual relationship with the Second appellant, they have a child and a second child is on the way"

17. It is very clear from the three passages quoted above that the Judge accepts, indeed it was not challenged by the Respondent, that the Appellants are not married, that they have had and continue to have a sexual relationship and that their relationship is evidenced by the birth of two children.

18. Given this acceptance and the basis of the appeal it was incumbent upon the Judge to deal with the claim that the Appellants would face persecution in Pakistan from the authorities or from extremists due to their unmarried sexual relationship evidenced as it was by the birth of a child. The determination does not deal with that at all. Findings are made as to the credibility of the First Appellant's account of how she began her relationship with the Second Appellant and her parents' knowledge of that relationship but no mention is made of their commission of the crime of *zina* or of the risk from the authorities or extremists until paragraph 72

> "I find that there is no real risk to the Appellants on return to Pakistan from either the First Appellant's parents or the authorities or from Pakistani society at large."

19. No reason is given for the conclusion that there is no real risk from the authorities or Pakistani society at large. Equally the following paragraph referring to the expert's report states that the report is not corroborative of the First Appellant's contention that she will suffer death, violence or revenge from the authorities or her family. No reason is given for this finding which appears to fly in the face of the report and I will refer to this further below.

20. In any event it is apparent from the determination that the Judge has not engaged with the issue of persecution by state or not state agents in the light of the accepted facts. This is in my judgement a material error of law and the decision of the First-tier Tribunal must be set aside.

21. Having come to this conclusion I will deal only briefly with the second ground of appeal being the assertion that the Judge's credibility findings are based upon mere speculation and cannot stand. It is quite clear from

examining the Judge's credibility findings that he believed the basis of the Appellants' claim, if not the fact of their unmarried sexual relationship, to be fabricated. The credibility findings start at paragraph 66 with the phrase *"I do not believe in all the circumstances …"* and continue in similar vein over the ensuing three paragraphs. In short the Judge does not believe that events happened as claimed but the basis for his lack of belief is not founded upon inconsistencies or discrepancies but on what he considers to be a lack of plausibility taking account of what he believes is more likely to have happened. The Judge does not believe, for example, that

> " … a young single daughter of a successful middle class Muslim family in Pakistan would have placed herself in circumstances where she would be living with a young single man in the same house and would be having unsupervised contact with him…"

or that this having happened

> "she neglected to tell her parents …"

The basis of the Judge's lack of belief does appear to be firmly rooted in how he thought a young, single Muslim woman would act or the control that he believed her parents would exercise over her. There is in my judgement good reason to assert that such findings are unsafe.

Remaking the decision

22. Having found a material error of law and the decision of the First-tier Tribunal having been set aside the circumstances are such that I am able to remake the decision. The basis of the Appellants' claim is that they will face persecution or serious harm in Pakistan due to their unmarried relationship and the resultant birth of their two children. The expert's report, accepted by the First-tier Tribunal as an erudite academic analysis of the law and issues relating to adultery and sexual relationships in Pakistan commences with a very specific opinion that she will face difficulties

> "… I say at the outset that in core respects my assessment … stands independent of truth or falsity of (the First Appellant's) claims … because if she were to return to Pakistan with her children born out of wedlock and her unmarried partner and live her life there as an independent family unit this couple would face the difficulties and risks of harm that I set out below. This risk of harm, mainly due to the reason that she has illicit relations with her partner and has children born out of wedlock, can be very well assessed from the back ground material available in the form of various well researched academic writings along with the entire case law developed under the draconian zina law relating to illicit relationships, adultery and raising such children who would be labelled as illegitimate and/or born as a result of fornication or adultery" (paragraph 10)

23. The report goes on to describe the crime of '*zina*' as meaning illicit sex covering any form of extra-marital sexual intercourse. There is, it says, no room for extra marital relations within Pakistani society. It a grave

infringement of the sexual morality of Islam and a serious crime against the laws of God.

> "Grave punishments, in the view of many people even extending to stoning to death, are therefore seen as the proper punishment for such non-marital sexual acts. While officially no person has, so far been stoned to death under state law in Pakistan as a punishment for zina, given the increasing influence of Islamic extremism, men and women accused of zina are exposed to the risk of extra legal 'justice' and to a risk of honour killings by family members or some extremist individuals/groups" (Paragraph 15)

24. The report quotes from the law relating to adultery in Pakistan. The definition of *zina* is simply wilful sexual intercourse outside marriage. The penalty can be stoning to death or severe corporal punishment. Evidence can include pregnancy or the birth of a child (paragraph 18) so long as there was also evidence that the woman was a consenting party (paragraph 19/20). After dealing with what appears to be a softening of the stance of the Pakistani authorities in respect of *zina* following the Women's Protection Act 2006 the report summarises at paragraph 35

> "In my opinion (having direct relevance to the present case)it is to be noted that even after the passing of WPA 2006 Pakistan's (partly repealed now) under Hudood Ordinance extra marital pregnancy or giving birth to an illegitimate child is considered as proof of zina. So it becomes absolutely necessary for the woman to justify birth of her child born out of wedlock either by claiming rape or a valid marriage and if she fails to do so then pregnancy/birth becomes a proof of public zina without the need for four witnesses or a confession."

25. The report concludes in this section that it is likely that the First Appellant could be prosecuted but in any event the First Appellant may fear

> "…not only the wrath of her own family, but also of the religious extremists in Pakistan. The effect of the Islamisation and in fact Talebanisation of Pakistani laws over the years has clearly been that such 'immoral women' or couples have very reason to fear for their lives"

26. It is in my judgement clear on the accepted facts that the First and Second Appellant are guilty of the crime of *zina*. This is a crime which, according to the expert's report, carries severe punishment which if imposed would amount to either death or inhuman treatment reaching the level of torture. It can be little comfort that it is unusual for the state to prosecute the offence particularly when according to the expert's report the punishment for such an offence may be extra judicial. There is nothing to contradict the expert's conclusion that persons in the Appellants' position have every reason to fear for their lives and it is for this reason that this appeal must be allowed.

Summary

27. The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision and remake it by allowing the Appellants appeal on Refugee Convention and Human Rights Convention (Article 2 and 3) grounds.

Signed: **Date: 3 March 2015**

J F W Phillips
Deputy Judge of the Upper Tribunal