Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10308/2013
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 June 2015	**On 13 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

SM (FIRST APPELLANT)
XM (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Nicholson, Counsel, instructed by North Kensington Law Centre
For the Respondent: Miss E Savage, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify either of the Appellants. Breach of this order can be punished as a contempt of court. We make this order because the Appellants may be put at risk solely because of their claims attracting publicity, and because the Second Appellant is a minor.

2. At the conclusion of the hearing we stated that this appeal would be allowed and that our reasons would be given subsequently in writing. These are our reasons.

3. This is an appeal against the decision of First-tier Tribunal Judge Wyman dismissing the Appellants' appeal against a decision of the Secretary of State refusing their applications for asylum. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 2 February 2015.

4. The background can be shortly stated. The First Appellant is a citizen of Albania whose date of birth is stated as 19 October 1994. The Second Appellant is her son, born in the United Kingdom on 18 October 2012. The First Appellant's case is that for her to return to Albania would place the United Kingdom in breach of its international obligations. She fears persecution if she is returned to Albania because of a blood feud arising from a dispute with another family. She says she entered into a relationship with the son of that family and became pregnant. Her brother learned of this pregnancy and met the son. A fight ensued during which the son was killed. The brother fled to Italy. The First Appellant's uncle arranged for her to come to the United Kingdom. In July 2011 she miscarried, losing the twins she was carrying. Her son, the Second Appellant, was born some 15 months later.

5. The First-tier Tribunal heard from the First Appellant, and from Mr Achila, a social worker. It considered medical evidence in the form of two letters from Parveen Powar, consultant adolescent psychotherapist, dated respectively 27 November 2013 and 15 May 2012, together with a substantive report from Dr Rachel Thomas, chartered consultant clinical psychologist, dated 23 December 2013. In addition it considered a country expert report prepared by Sonya Landesman dated 12 December 2013.

6. The grounds of appeal, upon which permission was granted, concerned an alleged error of law on the part of the First-tier Tribunal Judge in failing to consider the high risk of suicide by the First Appellant were she and her son to be returned to Albania. It was suggested that the content of the country expert was disregarded. Other grounds focussed upon alleged errors by the First-tier Tribunal Judge in her overall assessment of the evidence.

7. We formed the view from our reading of the papers and from listening to the submissions on behalf of the parties that there was a more fundamental issue which ought to be addressed prior to determining the grounds advanced on behalf of the Appellants.

8. There are repeated references in the papers to the First Appellant's mental health. It was expressly confirmed before the First-tier Tribunal Judge that no claim was being made under Article 3 in respect of her physical or mental health. Paragraph 64 of the judgment records: "Whilst it was acknowledged that the [first] appellant was suffering from depression, it was accepted that this was not enough to be granted leave to remain solely on this issue".

9. There was also material in the medical evidence (recorded at paragraph 5 above) to suggest that the First Appellant was suffering from depression, experienced fluctuations of mood and was considered to require ongoing psychological help and support from social services, particularly in caring for her baby. It is a matter of record that the First Appellant was a minor when she entered the United Kingdom and remained so at the time of her early interviews with the authorities.

10. In our view, there were sufficient indicators when the matter was before the First-tier Tribunal to place all concerned on notice that the First Appellant was potentially a vulnerable witness such as to engage the ***Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*****.** The existence, relevance and application of this Note was not raised on behalf of either of the parties nor by the First-tier Tribunal of its own motion.

11. We consider this to have been a significant oversight both generally and in the particular circumstances of the matters which were being determined. Much turned on credibility, and the First-tier Tribunal Judge was evidently influenced by apparent inconsistencies in the First Appellant's narrative of events on various occasions. It may be a different view would have been taken of inconsistencies in the evidence had the First-tier Tribunal Judge considered the extent to which the First Appellant's age and vulnerability may have contributed to any discrepancy or lack of clarity.

12. We invited submissions from Mr Nicholson and Ms Savage as to whether this failure to consider this matter constituted a '***Robinson*** obvious' point. Mr Nicholson, unsurprisingly, answered that it was. Ms Savage said otherwise, and relied *inter alia* upon the fact that the First Appellant had been represented at the time (not by Mr Nicholson) and that if her own representative had chosen not to treat the First Appellant as vulnerable that should be determinative. However, Ms Savage very fairly conceded that had it been brought to the attention of the First-tier Tribunal Judge that the First Appellant might properly have been considered to be a vulnerable witness, it is impossible to know whether the Judge's findings would have been the same or not. It was noted that the Guidance provides that if the issue of vulnerability is raised, a witness is to be treated as if he or she were vulnerable unless and until the contrary is proved.

13. We are of the opinion that the witness vulnerability point is indeed '***Robinson*** obvious'. The decision of the Court of Appeal in ***Regina v Secretary of State for the Home Department, ex parte Robinson*** **[1997] EWCA Civ 3090** has become an oft-repeated mantra in this and other jurisdictions. In paragraph 37 of the judgment of the court it is stated:

> "... it is the duty of the appellate authorities to apply their knowledge of Convention jurisprudence to the facts as established by them when they determine [asylum matters] and they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representative."

And at paragraph 39:

> "If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour [...] Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal."

14. This principle applies with equal force to the First-tier and Upper Tribunals as they are now constituted. Whilst it is unfortunate that the First Appellant's representative did not raise the issue of the First Appellant's vulnerability as a witness, there was sufficient material before the First-tier Tribunal for the matter to have been raised of its own motion. No appellant should be prejudiced or disadvantaged by an oversight on the part of his or her legal representative. Here the fairness of the proceedings was infected by a failure to follow the Joint Presidential Guidance Note. In the circumstances we cannot be satisfied that either the First Appellant nor – equally importantly – the Second Appellant who is a minor, enjoyed a fair hearing as guaranteed under Article 6 of the ECHR.

15. In the particular circumstances of this case, where the vast majority of the findings of the First-tier Tribunal Judge are predicated on her conclusions as to the First Appellant's credibility and where such conclusions were reached without reference to the Joint Presidential Guidance Note, the determination cannot stand and must be set aside. The entire matter needs to be decided *de novo* and must be remitted to the First-tier Tribunal for a fresh hearing before a different judge.

16. Since our conclusion on the vulnerability issue which we took of our motion is sufficient to be dispositive of the appeal, it is unnecessary for us to determine any of the grounds advanced on behalf of the Appellants in advancing the appeal. We deliberately refrain from expressing any view on the matters raised as none of the findings is preserved and the complex history and background will be examined afresh at the rehearing.

Notice of Decision

The appeal is allowed. The determination is set aside. The case will be decided again in the First-tier Tribunal.

1. Matter to be listed at Hatton Cross (not Judge Wyman)
2. Albanian interpreter required
3. Time estimate of 4 hours
4. Appellant and a number of experts to be notified in due course
5. List of witnesses

Signed

Mark Hill QC
Deputy Judge of the Upper Tribunal

Dated 24 June 2015