IAC-FH-NL-V3

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/45722/2013
IA/45721/2013
IA/45723/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 March 2015	**On 8 May 2015**
Prepared 31 March 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR AKC
MRS MC
MR AC
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Hayward, Counsel instructed by Dent Abrams Solicitors
For the Respondent: Ms A Brockleby-Weller, Senior Presenting Officer

DECISION AND DIRECTIONS

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1. The Appellants, nationals of India, respective dates of birth 3 May 1957, 20 July 1962 and 24 December 1990 appealed against decisions made by the Secretary of State to make removal directions, dated 24 October 2013.

2. Their appeals came before First-tier Tribunal Judge Pears (the Judge) who, on 5 December 2014, dismissed their appeals under the Refugee Convention and on human rights grounds on the basis of Articles 3 and 8 of the European Convention on Human Rights.

3. Permission to appeal the judge's decisions was given by First-tier Tribunal Judge Pooler on 30 January 2015.

4. The grounds seeking permission were settled by Mr Hayward who had appeared before the judge.

5. It is fair to say that the judge's approach to the evidence in one sense appears to be requiring a higher standard of proof than might be expected, bearing in mind the lower standard of reasonable likelihood or real risk which has to be established. Whilst the judge recited the threshold of evidence required, it appeared to me on a reading of the decision that the judge was actually expecting a good deal more than met that standard.

6. Of particular concern to me in reading the decision were the following matters. First, that the judge had rejected a report from an advocate, Mr M K Chouhan, who is an advocate of the High Court of Punjab and Haryana as well as an approved advocate in the District Courts of Haryana, a Member of the Bar of Punjab and Haryana Chandigah, holding a degree in law and being an experienced practitioner continuously practising in the High Court of Punjab and Haryana as well the District Courts to which I have referred, with some 31 years of practice in law and familiar with both criminal and civil law as applicable in India. His opinion set out a fair and balanced approach to the issues raised and, amongst other things, identified by reference to specific legislative provisions that the matters which were contained within an FIR lodged against the first Appellant implicated him in serious criminality: Being offences which do not attract the immediate release on bail and which, as he acknowledged, there was no chance of bail for "quite a long time". He was not, as the judge characterised, simply saying bail cannot be obtained but he was in fact accepting it may be but after a significant period of delay. His remarks generally about health provision in Indian prisons and steps being taken to quash, false allegations raised, appeared to me to be perfectly sensible and do not disclose bias or prejudice or an unbalanced opinion in relation to the first Appellant.

7. In the circumstances, at paragraph 73 of the decision by the judge, I do not find it is adequate reasoning to say in regards to the first Appellant's and his legal position:

> "I have no confidence that the 'legal opinion' is an impartial objective account of the legal position in India and that the FIR could not be quashed or bail granted. However if I were to accept it as being accurate it may take about a year for a decision on the case on merits." (sic).

This really does not get to grips with the significance of the background material which had been provided which shows what some might categorise as appalling, the woefully inadequate provision for detainees both in pre-trial detention and during trial. To blithely assert that the Appellant could in due course be released after a year from such detention really does not meet with the Article 3 issue and appeared also to me to be requiring a greater weight of evidence than necessary to discharge the burden of proof of real risk.

8. The judge also simply failed to properly address the evidence that was before him concerning the deficiencies identified in the background evidence provided both in terms of conditions in detention, conditions of gross overcrowding of people awaiting trial and the pre-trial detention being arbitrary and lengthy: Sometimes exceeding the sentence given to those convicted: I bear in mind the dispute was claimed to be a civil matter in relation to a death but which has manifested itself as, in effect, obtaining property or money by deception. For that reason alone, I am left with considerable concerns that the judge's failure was a material error of law certainly which stands, come what may, in relation to the first Appellant.

9. However the position is to a degree the worst in relation to the second and third Appellants being respectively the first Appellant's wife and son. The judge had accepted that the first Appellant's daughter Arshya and her fiancé had returned to India where she had been picked up, her passport taken and she was detained as a result of a 'noting' entry in immigration controls at Indian airports. This had led to a period of her detention for ten days before ultimately being cleared of any relationship to, or involvement in the alleged offences committed by the first Appellant.

10. The judge found both Arshya and her fiancé, Mr Ricardo Soff, to be open and truthful. He concluded that there was nothing to suggest they were not telling the truth. He additionally heard about a brother-in-law of the first Appellant who had himself been detained, but ultimately cleared of any involvement, and who was not named in the relevant FIR against the first Appellant. It is plain that he could have no doubt that the FIR had been laid it was a legal document, even if its contents were false, and given the position there was nothing to suggest that equally on a 'noting' entry basis, either the second or third Appellants might not similarly be arrested. It was noteworthy in relation to Arshya that she had to pay bribes to the police not to inform the complainant, against the first Appellant, of her presence in the country, let alone to smooth her way through the process of detention. It does not seem to me the correct approach was to dismiss those possibilities simply on the basis that they can be resolved through legitimate legal means, that is due process, or by paying bribes: I conclude there has been a material error of law in that respect.

11. The further issue was taken over the question of the first Appellant's mental health. It seemed to me on the face of it that as an issue was never sufficiently significant to engage Article 3 ECHR in its own way but it was pertinent to how he would cope were he to be detained or to manage his personal circumstances. Again the judge's

view in relation to the significance of those matters seemed to me to have been driven by the view he took of the adverse conclusions upon the first and second Appellant. I note, at paragraph 67 of the decision, points that the judge took as to he adequacy of the evidence and in many respects those could have been freestanding and would not have been a basis on which I would have interfered or found any error of law in the judge's decision. However, it is the approach to both the standard of proof and to the evidence which supported the existence of the FIR and its abuse, as it is said by the Appellants, that the judge did accept and in that context it is hard to exclude risk to the first and second Appellants. Given what he has accepted in relation to the existence of the FIR and, although he makes no particular reference to it, the significance of detention on return and ill-treatment whilst in detention.

12. All the findings of fact need not be re-examined, particularly in relation to aspects of the decision which the judge properly reasoned but it seems to me the parties should, if they wish to preserve any of the findings of fact provide a list to the First-tier Tribunal so it may decide whether or not for the proper disposal of the appeal on re-making it, those or any of those findings of fact should stand.

NOTICE OF DECISION

13. For these reasons I find that the decision of the Original Tribunal cannot stand and it will have to be re-made.

DIRECTIONS:

1. It will be re-made in the First-tier Tribunal (IAC).
2. Time estimate 2 hours.
3. No interpreter required.
4. Any further documents relied upon for the purposes of re-making the Articles 3 and 8 ECHR claim to be submitted not later than ten clear days before the further re-making of the decision or unless the Tribunal otherwise orders.
5. Not to be listed before First-tier Tribunal Judge Pears or First-tier Tribunal Judge Pooler.

14. An anonymity order is not necessary.

Signed Date 6 May 2015

Deputy Upper Tribunal Judge Davey