Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03717/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 5th May 2016

Decision & Reasons Promulgated
On the 17th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS SHIMA AKTER

(anonymity direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chowdhury (Solicitor)
For the Respondent: Mr Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Veloso promulgated on the 22nd October 2015, in which he dismissed the Appellant's appeal under the Immigration Rules, under Article 3 and under Article 8.

2. The First-tier Tribunal Judge refused the Appellant's application to amend the Grounds of Appeal to include arguments that she will be persecuted and that she was entitled to Human Rights and protection under Article 3 in respect of her treatment upon returning to Bangladesh and did not accept the submission by Mr Chowdhury when appearing before the Tribunal in the First-tier that a Section 120 Notice could be added to at any time.

3. Permission to appeal has been granted by First-tier Tribunal Judge Holmes against that decision following the Appellant's appeal on the basis it was arguable that the Judge erred in refusing to engage the argument that the Appellant would be at a real risk of a breach of her Article 3 rights in the event of her returning to Bangladesh and the protection issues that she raised. However Judge Holmes found that there was no arguable merit in the complaint made within the Grounds of Appeal about the findings of primary fact made by the Judge and that she plainly faced significant credibility issues and the findings were well open to him on the evidence and were adequately reasoned. He further found there was no error in the Judge's approach either to Section 55 or the overall assessment of the proportionality of the return with her children to Bangladesh.

4. In his oral submissions to me Mr Chowdhury relied upon the Grounds of Appeal and sought to argue that a Section 120 Notice had been served and that the Article 3 arguments had been raised properly by the Appellant and that the Judge should not have restricted the case to considerations under Article 3 and Article 8 simply in respect of her health. He argued that the Judge had made a material error in respect of Section 120 and that the case should be remitted back for re-hearing. He argued that the Judge did have jurisdiction to consider the additional Grounds of Appeal following the service of the Section 120 Notice and that they should have been considered by him.

5. In his submissions on behalf of the Respondent Mr Kotas accepted that a Section 120 Notice had been served on the 12th January 2015 in the ISI 151B. Mr Kotas handed up to me the case of Jaff (Section 120 Notice; Statement of "Additional Grounds") [2012] UKUT 00396. However, he conceded quite properly that that case related to a situation where there have been absence of a Section 120 Notice, and therefore where, in the absence of a Section 120 Notice and a Statement of "Additional Grounds" the Appellant could not rely on the Immigration (European Economic Area) Regulations 2006 before the First-tier Tribunal, as that had not formed part of his application for Leave to Remain made to the Respondent. Within the Jaff case it was also stated that "a statement of 'additional grounds' may be made in response to a Section 120 Notice at any time, including up to (and perhaps at the time of) the hearing of the appeal". It was also stated that "although the legislative scheme prescribes no particular form in which a statement of 'additional grounds' must be made, such a statement must as a minimum set out with some level of particularity the ground(s) relied upon by the Appellant as the foundation for remaining in the UK and upon which reliance has not previously been placed. It must 'state' the additional grounds to be relied upon in substance or at least, in form".

6. Mr Kotas conceded that the First-tier Tribunal Judge was wrong in law to say that the Section 120 Notice could not be added to at any time and that the Appellant was entitled to file further Grounds of Appeal, and that was in effect the point of a Section 120 Notice. He conceded that further grounds could be argued in a Skeleton Argument, but argued that the previous Grounds of Appeal had not mentioned persecution, but he argued that the arguments contained within the Skeleton Argument did not contain the level of particularity necessary to amount to 'additional grounds' in that they had not been said to be 'additional grounds' within that Skeleton Argument. He did concede that possibly the correct approach would have been for the Respondent to ask for an adjournment to consider the issues, but sought to argue that even if the Judge was

wrong in failing to consider the additional arguments, that the error was not material, in that in the case of SA (Divorced Women – Illegitimate Child) Bangladesh CG [2011] UKUT 00245, given the Judge's findings regarding the support that the Appellant had previously received, he argued it was difficult to see how she could now succeed in respect of her new arguments and that the decision would have been the same irrespective.

My Findings on Law and Error of Materiality

7. The case of Jaff (Section 120; Statement of "Additional Grounds") [2012] UKUT 00396, is authority for the proposition that a statement of additional grounds may be made in response to a Section 120 Notice at any time, including up to (and perhaps at the time of) the hearing of the appeal and that there is no particular form in which such a statement of additional grounds must be made, but such a statement must as a minimum set out with some level of particularity the ground(s) relied upon by the Appellant as a foundation for remaining in the UK and upon which reliance has not previously been placed. It must state the additional ground to be relied upon in substance or at least in form.

8. As was properly conceded by Mr Kotas on behalf of the Respondent, the Judge was wrong to say that the Section 120 Notice could not be added to at any time at [14]. Firstly, the Judge appears to have misunderstood that in fact the Section 120 Notice is served not by the Appellant, but by the Respondent and under Section 120(2) of the Nationality, Immigration and Asylum Act 2002, it is provided that "the Secretary of State or the Immigration Office may by notice in writing require a person to state – (a) his reasons for wishing to enter or remain in the United Kingdom; (b) any grounds on which he should be permitted to enter or remain in the United Kingdom, and (c) any grounds on which he should not be removed from or required to leave the United Kingdom".

9. Under Section 120(3) the statement under sub-section (2) need not repeat reasons or grounds set out in – (a) the application mentioned in sub-section (1)(a), or (b) an application to which the immigration decision mentioned in sub-section (1)(b) relates.

10. The whole purpose of the Section 120 Notice is that if the Appellant does not in reply to the Section 120 Notice state all of the grounds upon which he or she should not be removed or required to leave the United Kingdom or should be permitted to remain, then the Appellant may not subsequently be allowed to argue those points. It is a way of ensuring that all of the arguments are dealt with at once and it is therefore often referred to as "a one stop" notice. As was set out within the case of Jaff, the statement of additional grounds may be made in response to a Section 120 Notice at any time up to (and perhaps at the time of) the hearing of the appeal.

11. I do agree with Mr Kotas that the Judge was wrong in law in finding that a Section 120 Notice once lodged could not be added to at any time. Additional grounds having been argued within the Skeleton Argument, as is properly conceded by Mr Kotas was a viable course of action taken by the Appellant, the Judge should have considered those additional grounds raised. It was procedurally unfair for the Judge not to do so, when they had been raised within the Skeleton Argument, in circumstances where a Section 120 Notice had been served, and this would thereby be the Appellant's one opportunity to argue those points. The Judge in such circumstances did err in limiting the appeal simply to the Article 3 health arguments and the arguments under Article 8.

12. In respect of the submissions made by Mr Kotas that the arguments raised within the Skeleton Argument were insufficient to amount to additional grounds, having considered the Skeleton Argument submitted on behalf of the Appellant before the appeal on the day of the hearing, it is clear that at paragraph 15.1 and 15.2, that the Appellant was seeking

to argue that she feared persecution upon her return to Bangladesh of inhuman and degrading treatment for giving birth to two minor children out of wedlock, and that such children born out of wedlock are considered to be illegitimate, and that the children as well as the Appellant would be considered to be a social outcast in Bangladesh and would suffer discrimination because of the pervading social stigma and prejudice against such children.

13. It was further argued that there would be a real risk of violence to the Appellant as a single woman who is a social outcast and that she has a real risk of suffering sexual violence, harassment for being morally lax and that it was argued that she would not receive any support from her own family or from members of the community and had difficulty gaining protection from the law enforcement bodies.

14. It was further clear in paragraph 11 that the Appellant was seeking to rely upon the Upper Tribunal decision in the case of SA (Divorced Woman – Illegitimate Child) Bangladesh CG [2011] UKUT 00254 (IAC), and therefore such arguments were clearly set out both in substance and in form and with a sufficient level of particularity within the Skeleton Argument. Therefore it did amount to additional grounds, which the Judge therefore should have allowed to be argued at the appeal hearing. This is especially the case when the Judge was also considering the claim under Article 8 as to whether it would be disproportionate to the Appellant's and her children's family and private life for them to be removed from the UK. The extent to which they might face persecution or difficulties in Bangladesh as a result of the children being illegitimate would clearly factor into that assessment as well.

15. Clearly these arguments will also be relevant to the extent that the Judge did consider under Article 8 that the move to Bangladesh would initially constitute a change for the Appellant and her children, but his finding that they would be able to adapt at [61]. The Judge has therefore

failed to take account of material arguments in this regard, in respect of his analysis of Article 8, as a result of the failure to allow the more expansive Article 3 argument to be run.

16. In respect of the argument that the decision of the Judge would have been the same in any event, the Judge found that the Appellant and her children would be able to benefit from the assistance of UTSHO, a charity that provides support for mothers with children in need including single mothers and that they would be suitably accommodated and maintained whilst the Appellant seeks and finds employment and establishes herself in her home country and that the charity's assistance included free day care for single working mothers at [54] and that the Judge at [47] found that the Appellant would have the financial support of her many friends whom she claimed to have been supporting her during her stay in the UK and the Judge did not accept that her friends would not support her if she returned to Bangladesh".

17. However, although within the country guidance case of SA (Divorced Woman – Illegitimate Child) Bangladesh CG [2011] UKUT 00254 it was stated that "(4) the mother of an illegitimate child may face social prejudice and discrimination if her circumstances and the fact of her having had an illegitimate child become known, but she is not likely to be at a real risk of serious harm in urban centres by reason of that fact alone" and that "(5) the divorced mother of an illegitimate child without family support on returning to Bangladesh would be likely to have to endure a significant degree of hardship but she may well be able to obtain employment in the garment trade or obtain some sort of accommodation, albeit of a low standard. Some degree of rudimentary state help would be available to her and she would be able to enrol her child in a state school. If in need or urgent assistance she would be able to seek temporary accommodation at a women's shelter. The conditions which she would have to endure in re-establishing herself in Bangladesh would not as a general matter amount to persecution or breach of her

rights under Article 3 of the ECHR. Each case, however, must be decided on its own facts having regard to the particular circumstances and disabilities, if any, of the woman and the child concerned".

18. Given the Upper Tribunal indicated that each case was in fact fact specific and that the facts of the particular woman and children had to be taken into account, I am not persuaded that the decision would have necessarily been the same irrespective of the Judge's error in failing to allow these additional arguments to be run (CA v SSHD [2014] EWCA Civ 1165). The fact that such arguments might be unlikely to succeed does not mean that they would inevitably fail and the decision would have been the same. First-tier Tribunal Judge Veloso, not having considered the arguments raised by the appellant of the risk to her and to her children specifically as a result of the children being born out of wedlock, and simply not having considered those arguments in assessing her ability to return both under Article 3 and Article 8, I therefore do consider that the Judge's error in failing to allow the Appellant to raise the additional arguments following the service of a Section 120 Notice as additional grounds of appeal did amount to a material error of law, such that the decision of First-tier Tribunal Judge Veloso is set aside with no preserved findings of fact, the matter is remitted back to the First-tier Tribunal for a re-hearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge Veloso.

Notice of Decision

The decision of First-tier Tribunal Judge Veloso does contain a material error of law and is set aside;

The appeal is remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Veloso.

Signed

R McGinty

Deputy Judge of the Upper Tribunal McGinty Dated 5th May 2016