Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09775/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16 February 2016	**On 3 March 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

[S B]
~~**[No anonymity direction made]**~~

Claimant

Representation:
For the claimant: Mr A Khan, instructed by Bukhari Chambers Solicitors
For the respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Row promulgated 20.7.15, allowing the claimant's appeal against the decision of the Secretary of State, dated 23.2.15, to refuse her application made on 24.12.14 for indefinite leave to remain in the UK as the victim of domestic violence, pursuant to paragraph 289A of the Immigration Rules and to remove her from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 16.7.15.

2. First-tier Tribunal Judge Grant granted permission to appeal on 23.10.15.

3. Thus the matter came before me on 16.2.16 as an appeal in the Upper Tribunal.

Error of Law

4. I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Row to be set aside, and remitted the making of the decision in the appeal to be made afresh in the First-tier Tribunal. Having indicated my decision at the hearing, I reserved my reasons, which I now give.

5. The relevant background can be briefly summarised as follows. Following her marriage to her cousin, the claimant arrived in the UK on 30.10.12. Her marriage broke down during her probationary leave period and in fact within 5 months of arrival. She left her husband in March 2013 and went to live with her sister. She claims to have been the victim of domestic violence, including being slapped and burnt with a cigarette on two occasions. No divorce proceedings were instituted and in January 2015 she began to live with another man, also a relation, and was due to give birth to their child in November 2015.

6. In summary, the single ground of application for permission to appeal submits that in the absence of evidence to satisfy the requirements of the Rules, the claimant failed to discharge the burden of proof on her and the judge erred in finding the claimant was a victim of domestic violence.

7. In granting permission to appeal Judge Grant noted that paragraph 289A(iii) of the Immigration Rules requires the claimant to produce evidence that the relationship was caused to break down as a result of domestic violence. The claimant produced GP notes showing that she had reported domestic violence many months after the allege event and there was no examination or other independent evidence. The Secretary of State submits that this is not direct evidence but no more than a recital of what the claimant told her GP, and which would be entirely consistent with her laying the foundation for a claim to remain on the grounds of domestic violence.

8. The medical notes show that she visited her GP on 26.8.14 and reported cigarette burns. The GP did not record seeing any scars or marks, which is significant when it is well known that a cigarette burn leave very distinctive scaring. There were further visits on 29.9.14 and 18.11.14, in which the claimant also asserted having been the victim of domestic violence. However, she left her husband in March 2013 and the first report to the GP was not until some 17 months later.

9. More significantly, it is clear from §19 through to §22 of the decision that the First-tier Tribunal Judge was not satisfied about the claimant's assertions of domestic violence. The judge expressed "reservations" about the evidence of the claimant and her sister. The judge did not accept the claimant's account of when she first began to live with her present partner and concluded that both she and her sister were not telling the truth. The judge considered the medical notes, stating at §22 that, "I am not convinced that it is corroboration. The judge noted that she had seen her GP on three previous occasions after the supposed date of the domestic violence and yet never mentioned it on any of those occasions.

10. At §23, the judge considered that the GP visit in August 2014, three months before her application was submitted, "gives the impression that she saw her GP then for the purpose of establishing a reference to domestic violence on the medical records which could be used to corroborate her case."

11. Despite those findings and reservations, the judge went on at §24 to observe that the fact that the claimant and her sister may have been less than honest about the nature of her relationship with her present partner, "does not necessarily mean that she is lying about having been assaulted. Nor does the fact that she may have visited her GP to establish a record of domestic violence mean that no domestic violence had taken place."

12. Whilst the judge was in effect right to keep an open mind, the difficulty with the decision is that at §26 the judge departed entirely from the evidence and in effect speculated, stating, "Something cause the breakdown of the marriage," and at §28 and continuing in §29, "The appellant had been with her husband for less than five months. In her circumstances it must have been something drastic which caused the separation. The marriage had broken down quickly. The likely explanation I find I that the appellant is telling the truth about the domestic violence she was subjected to and that this was the cause of the breakdown of the marriage."

13. On the findings of the judge, there is no evidential basis for the conclusion reached; it is entirely speculation to suggest that "something" must have caused the breakdown of the marriage and then to conclude that that something must be domestic violence; there are, of course, many other reasons for the breakdown of such relationship. The claimant's credibility had been undermined, she had been disbelieved on elements of her claim, there was a lack of independent evidence, and an apparent attempt to shore up the claim by making very late claims to her GP of domestic violence, despite having failed to mention the same when making earlier visits to the same doctor. The judge appears to excuse the absence of evidence in §24 and §25. The reasoning cited provides inadequate and flawed justification for the conclusion reached by the First-tier Tribunal Judge. It would, in theory, have been open to the judge to reach a conclusion that the claimant is truthful about domestic violence, but the way in which the decision was made is perverse and amounts to an error of law such that the decision cannot stand and must be set aside. As the judge did not go on to consider whether there were any compelling circumstances to justify granting leave to remain outside the Rules on the basis of article 8 ECHR private and/or family life, it was not possible to conclude the appeal by simply remaking the decision in the Upper Tribunal.

14. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier

Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

15. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

16. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside to be remade afresh, with no findings of fact preserved.

I set aside the decision.

I remit the making of the decision in the appeal to the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

17. The decision in the appeal is remitted to the First-tier Tribunal at Sheldon Court, Birmingham, to be decided afresh with no findings of fact preserved;

18. It may be listed before any First-tier Tribunal Judge, with the exception of Judge Row and Judge EB Grant;

19. There will be two witnesses in addition to the claimant;

20. The estimated length of hearing is 2 hours;

21. An interpreter in Urdu will be required;

22. Not less than 14 working days before the relisted appeal hearing, the claimant must lodge with the Tribunal and serve on the Secretary of State a single consolidated, paginated, bundle of all subjective and objective evidence to be relied on, together with a skeleton argument. Documents produced on the day of the hearing will not be accepted.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated