



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01405/2015

THE IMMIGRATION ACTS

Heard at Field House

On 25 May 2017

**Decision & Reasons
Promulgated
On 14 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

[L B]

~~(ANONYMITY DIRECTION NOT MADE)~~

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Karim of Counsel instructed by M A Consultants
(London)

For the Respondent: Mr. P. Nath, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Talbot, promulgated on 7 November 2016, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse the Appellant admission to the UK and to revoke her EEA residence card.
2. Permission was granted as follows

“It is arguable that the Judge has made credibility findings across too narrow a part of the spectrum of the available evidence. The Judge has encapsulated the basis for the findings as to credibility at paragraph 18 of the decision.

It is arguable that the scope of the material referred to at paragraph 18, without making findings of fact across at least a part of the remaining spectrum of evidence, as delineated in the permission to appeal, has affected the overall assessment of credibility. It is arguable that on the basis of the scope of the material considered in the decision leading to the credibility findings set out, insufficient analysis has been set forward in the context of the evidence as to domestic violence.”

3. I heard submissions from Mr. Karim and Mr. Nath following which I reserved my decision.

Submissions

4. Mr. Karim relied on the grounds of appeal. He submitted that the judge had been entitled to consider both the retained right of residence and the extended family member point as there was a right of appeal in respect of the retained right of residence. Therefore, although there was no right of appeal in respect of extended family members, the right of appeal in relation to the retained right of residence was a gateway to the Tribunal. The judge was therefore entitled to consider both issues. He referred me to paragraph 5 of the decision where it was accepted by the representatives that both issues were before the judge.
5. He referred me to the Record of Proceedings from the hearing in the First-tier Tribunal. The Appellant and the witness had given largely consistent evidence, but the judge had focused on one inconsistency and used that to determine everything else. There had been no cross-examination on the issue of domestic violence.
6. I was referred to question 20 of the Appellant’s interview at port where she had said that her ex-husband had been hostile and aggressive. The judge’s findings were silent in respect of this.
7. In response to the Rule 24 response he submitted that the point made in relation to annulment did not hold weight. Regulation 10 of the EEA Regulations referred to “termination”. I was referred to Article 13 of the Directive which referred to “retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership”. The Directive, which had direct effect, specifically referred to annulment.
8. Mr. Nath relied on the Rule 24 Response. In relation to the reference to the “hostile” behaviour of the Appellant’s ex-husband at question 20 of

the interview at port, I was referred to paragraph 10 of the decision where the judge had set out the evidence. He agreed that the Presenting Officer at the hearing in the First-tier Tribunal had not cross-examined on the issue of domestic violence. However he submitted that if the judge wanted to ask questions and delve further into this he could. Reference had been made to domestic violence at the hearing, and it was a question of establishing how this reference had been made, whether by reference to the statement of the Appellant or by reference to questions asked.

9. At this point I considered the Record of Proceedings from which it appears that the judge asked some questions himself on the domestic violence issue. As stated above, it had been accepted by Mr. Nath that there had been no cross-examination by the Presenting Officer in relation to domestic violence. Mr. Nath accepted that it may not be clear where the evidence referred to in paragraph 10 had come from, whether it was from the Record of Proceedings alone or also from the witness statement.
10. In relation to the finding in paragraph 20 that there was no supporting evidence of domestic violence, Mr. Nath submitted that the Appellant had not reported the violence. The judge had considered the evidence such as there was before him, and had made a clear finding at paragraph 20.
11. In relation to the right of appeal as an extended family member, he relied on the Rule 24 Response and the case of Sala (EFMs: Right of Appeal) [2016] UKUT 00411 (IAC). The Home Office position was that the right of appeal was in respect of the retained right of residence only. However he acknowledged Mr. Karim's point which was that if there was a right of appeal in respect of one issue, other issues should be considered. What had to be considered by the Tribunal was whether the Appellant had any right to a residence card under any of the Regulations.
12. In response Mr. Karim referred to the fact that at paragraph 20 the judge had said there was no supporting evidence. However in paragraph 10 he had recited the oral evidence. The interview at the port was supporting evidence which had been overlooked. This evidence was in the Respondent's bundle. The findings in paragraph 20 were premised on the findings in paragraph 18. I was referred to paragraph 18(3). The judge stated the Appellant had "never provided any explanation as to the ground for an annulment of the marriage". However, in her witness statement the Appellant had said that she was not aware that the marriage was annulled, did not know what that meant, and had thought it was a divorce [3]. This was material evidence which had been overlooked.
13. Further, at question 8 of her interview at port, the Appellant had said that she was not sure what the divorce was called and had been of the view that she was agreeing to divorce. She did not understand what annulment meant. This issue was central to the Appellant's credibility. If one aspect of the credibility findings were defective the credibility findings as a whole could not stand. The credibility assessment had to be holistic. The Record

of Proceedings showed that extensive questions had been asked of the Appellant and Sponsor, and that their responses had been consistent. The judge had not engaged with this.

Error of Law

14. I have carefully considered the decision, in particular [18] to [20] where the findings are set out. In relation to domestic violence, it was accepted by Mr. Nath that the Presenting Officer at the hearing in the First-tier Tribunal had not cross-examined the Appellant on this issue. I have considered the Record of Proceedings from which appears that the judge asked a few questions of the Appellant at the end of cross-examination.
15. I have considered the evidence set out at [8] to [13]. At [8] the judge states that he heard evidence from the Appellant who began by confirming the contents of her two witness statements. He then summarises her evidence. It is not clear from the summary of the evidence which parts are a summary of the witness statement, and which parts are a summary of the oral evidence.
16. In relation to [10] and the findings on the issue of domestic violence, in her witness statement the Appellant stated “I rely on the answers given in my interview but also wish to add that he was very violent and I was beaten and was very scared of him” [4]. Taking this into account, it appears that some of the evidence set out at [10] was oral evidence given in response to the questions from the judge. For example, the Record of Proceedings indicates that the judge asked the Appellant whether she had sustained any serious injuries. However, paragraph 8 does not contain the judge’s findings, but is a summary of the evidence.
17. The judge attached little weight to the Appellant’s own evidence as set out at [9] to [12] as he considered her credibility damaged. His reasons for this finding are set out in paragraph 18. I have carefully considered this paragraph. There are three main inconsistencies, the third of which is in relation to whether the marriage was ended by divorce or annulment. The judge states that the Appellant had never provided any explanation as to the ground for an annulment.
18. However, I find that the Appellant stated in her witness statement [3]:

“I was not aware that the marriage was annulled, I don’t actually know what this means, I thought this was a divorce, I wanted to be free of the relationship and signed the papers I was given, and I was told that he will leave me alone if I sign the papers and we stayed together for just over a year”.
19. Further, in her interview at port, the Appellant was asked at question 8 what type of divorce and she stated, “I am not sure. I signed the papers but I am not sure what the divorce is called”.

20. I find that the Appellant had addressed the issue of the annulment. She had not given “an explanation as to the ground for an annulment”, as she has explained that was not aware of the difference between divorce and annulment, or even that her marriage had been annulled as opposed to terminated by divorce. I therefore find that one of the three most “glaring” inconsistencies, as they are described by the judge, is not an inconsistency at all. The judge has failed to acknowledge that the Appellant had addressed the fact that the marriage had been annulled. The fact that she could not give an explanation as to the ground for annulment, in circumstances where she did not know that the marriage had been annulled, does not indicate a glaring inconsistency in her evidence. The judge’s criticism for the lack of an explanation about annulment is without basis as the Appellant had explained both at port and in her witness statement that she did not understand what an annulment was.
21. I find that the decision involves the making of a material error of law in relation to the credibility findings in paragraph 18. If the credibility findings are infected in any way, given the holistic nature of the credibility assessment, I find that credibility findings as a whole cannot stand.
22. However, I have considered the judge’s treatment of the issue of domestic violence. At [20] the judge finds: “There is no supporting evidence about this and this therefore this rests solely on the evidence of the Appellant”. However, I find that it did not rest solely on the Appellant’s evidence. There is evidence in the Respondent’s bundle in the form of the interview conducted by UKBA at port. In this interview conducted in October 2015 the Appellant said that her ex-husband was hostile to her and aggressive. She went on to say in her interview that, while she had not reported him to the police, her new boyfriend had told her to take her ex-husband to court to seek “compensation for the aggressive way he treated me” (questions 21 to 25). The judge has not referred to this interview. He does not appear to have given it any consideration, and there is no reference in the decision to the Appellant’s statement that her ex-husband had been hostile and aggressive to her.
23. I find, as accepted by Mr. Nath, that there was no challenge to the claim of domestic violence by the Presenting Officer in the First-tier Tribunal. The judge appears to have asked a few questions about it but has not accepted the Appellant’s evidence because she provided no supporting evidence. However there was supporting evidence in the form of the interview with UKBA. I accept that there was not much detail in the Appellant’s witness statement in relation to domestic violence, but neither was there any cross-examination on this point.
24. I find that the judge has failed to take into account the evidence before him. I find that this is a material error of law.

25. In relation to the issue regarding the appeal as an extended family member, I have considered paragraph 5 of the decision where it notes that it was accepted and agreed that both issues could be decided by the judge. I find that there is no error of law in the consideration of both of these routes to entitlement. I find that the judge was entitled to consider all of the routes by which the Appellant had a right to reside under the Regulations, given that she had a right of appeal before the Tribunal in respect of her claim for a right to reside under regulation 10(5).
26. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. Given that I have found that the credibility findings cannot stand, and therefore given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Notice of Decision

27. The decision involves the making of a material error of law and I set the decision aside. The appeal is remitted to the First-tier Tribunal for rehearing.
28. No anonymity direction is made.

Signed

Date 13 June 2017

Deputy Upper Tribunal Judge Chamberlain