Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16524/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 6 November 2018	**On 27 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

PRERNA [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jones, counsel instructed by Jasvir Jutla & Co Solicitors
For the Respondent: Mr Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of India born on 23 December 1977. She arrived in the United Kingdom with a two year student visa on 20 March 2010. Her husband Mr [AA] and her children PA (DOB 30 June 2002) and AA (DOB 6 September 2005) joined her in the United Kingdom as her dependants on 11 August 2011. The Appellant's visa was extended subsequently on two occasions until 3 March 2015. The family then became overstayers and made an out of time application for leave to remain on the basis of their private and family life on 18 June 2015, which

was refused without the right of appeal on 18 August 2015. A subsequent application was made on 28 August 2015 which was refused in a decision dated 6 October 2016 again with the right of appeal. On 15 March 2016 the extant application was made which was refused on 22 June 2016 with the right of appeal. The Appellant exercised that right of appeal, raising human rights grounds only and her appeal came before First-tier Tribunal Judge Fox for hearing on 25 July 2017.

2. In a statement by the Appellant's husband dated 19 July 2017, a new issue was raised, which was the risk of persecution to the family as a consequence of their Christian religion. This was considered by Judge Fox to be a new matter. The Respondent objected to it being raised and thus the hearing was adjourned in order for the Appellant to consider whether she wished to claim asylum.

3. The hearing next came before the First-tier Tribunal on 7 September 2017, when it came before Judge of the First-tier Tribunal Row. The Appellant had not applied for asylum in the intervening period but her husband had made a claim and had had his initial screening interview. An application for an adjournment was made on the basis that all matters could be heard together once a decision had been reached in respect of the Appellant's husband's asylum claim. The Respondent did not support this request and the judge decided to continue with the appeal.

4. In a decision and reasons promulgated on 15 September 2017, the judge dismissed the appeal having rejected the credibility of the evidence of the Appellant, her husband and two witnesses as to the risk of persecution in India and he gave reasons for that decision. In respect of Article 8, the judge went on to find that if the Appellant and her husband were removed to India, it would be reasonable for the children to go with them.

5. Permission to appeal was sought, in time, on the basis that the judge had erred materially in law in proceeding with the appeal, during the course of which he considered the risk of persecution on the basis of the family's Christian religious beliefs, in that that involved consideration of the children's position which was necessarily linked to their father's asylum claim and that absent consideration of that claim by the Respondent the judge had fallen into error, the proper course being arguably for him to have adjourned the matter and to have considered both Article 8 and the risk to persecution after the Secretary of State had considered the father's claim.

6. Permission to appeal was granted by First-tier Tribunal Judge Pedro in a decision dated 16 March 2018 in the following terms:

> *"The judge refused to adjourn the hearing of this appeal which in itself does not appear to have been in error. However the judge also correctly observed that the Respondent had objected to the new matter of a fear of persecution being considered in this appeal [5]. By virtue of Section 85(5) of the 2002 Act a judge must not consider a*

new matter unless the Secretary of State has given consent to the Tribunal to do so. The meaning of a new matter was considered in Mahmud [2017] UKUT 488 (IAC) and the judge has explained why the alleged fear of persecution amounted to a new matter. Whilst the judge decided to proceed with the hearing of this appeal and referred to the Respondent having objected to the new matter being considered, he nonetheless went on to consider the new matter and make findings thereon [19 to 32 inclusive]. It is an arguable error of law for him to have done so although it is questionable whether or not the outcome of the appeal would have been affected even if he had followed the restriction under Section 85(5) and not considered the new matter at all. Nonetheless he has made findings on the new matter and the question arises as to whether or not his decision which includes such findings should be allowed to stand or is fatally flawed by an arguably material error of law."

Hearing

7. No Rule 24 response was supplied by the Respondent, but Mr Mills indicated that he opposed the appeal.

8. In submissions on behalf of the Appellant, Mr Jones submitted that the grounds of appeal hinge on the risk of persecution to the Appellant if returned back to India, that there had been no statement from the Appellant herself as to risk on return and there was no evidence before the judge as to the impact or potential impact on the children.

9. In his submissions, Mr Mills submitted that this was essentially an Article 8 human rights appeal based on the length of residence by the Appellant and in particular, her children. He submitted it was perfectly proper that the judge refused an adjournment and that the Home Office Presenting Officer had objected to the appeal being adjourned. He submitted that the judge had directed the Appellant to consider withdrawing her appeal but she had chosen not to do so and decided to proceed and thus was in essence attempting to have *"two bites of the cherry"*. Mr Mills submitted the thrust of the challenge was essentially a procedural complaint, i.e. that the judge should not have considered the asylum aspect at all as it was a new matter. However the problem with this is that if the judge had artificially ignored the issues raised in the Appellant's husband's statement, this was also material to a consideration of very significant obstacles, which required consideration as part of the human rights appeal pursuant to paragraph 276ADE(vi) of the Rules. Mr Mills submitted that the judge was bound to consider the evidence that was before him. Mr Mills submitted that the judge had acted fairly, he had heard evidence from the witnesses and it was hard to know what else he could have done.

10. In reply, Mr Jones submitted that the judge had erred in that his approach was a piecemeal approach rather than dealing with all the evidence and the evidence on the issue of asylum.

Decision and reasons

11. I reserved my decision which I now give with my reasons. With some reluctance, I have concluded that the judge erred materially in law in proceeding with the appeal, which involved consideration of an asylum claim made by the Appellant's husband, prior to any proper consideration or determination of that claim by the Respondent. The reason for my reluctance is that I consider that the Appellant's representatives have to take some responsibility for failing to seek an adjournment of her appeal prior to the day of the hearing, i.e. 7 September 2017, on the basis that the Appellant's husband's asylum claim, which impacted not only on his wife and children but also consideration of paragraph 276ADE(vi) of the Rules had not yet taken place and that it would be appropriate, in light of the overriding objective, for all matters to be heard together by the same judge if necessary in linked appeals. Whilst the judge was put in a difficult position, the hearing having previously been adjourned precisely in order for consideration to be given by the Appellant to making her own asylum claim, there was only a delay of about six weeks between the hearing on 25 July and that on 7 September, which would have been insufficient time for the Respondent to have reached a decision in respect of the asylum claim in any event. I find that the overriding objective to act fairly was infringed by the judge's decision to proceed, bearing in mind also that there was no statement from the Appellant as to any risk of persecution to her in an individualised sense, only the second statement of her husband dated 17 July 2017.

12. I have concluded that, given that the judge, in effect, dealt with the new matter contrary to the Respondent's objections as set out at the hearing on 25 July 2017, the decision to proceed was procedurally unfair.

Notice of decision

13. I set aside the decision of First tier Tribunal Judge Row and remit the appeal for a hearing *de novo* before a different Judge of the First-tier Tribunal. In light of the fact that the issue is one of procedural fairness, the findings made by the judge on the basis of the evidence before him cannot properly stand.

Signed Rebecca Chapman Date: 21 November 2018

Deputy Upper Tribunal Judge Chapman