



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01642/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On 30th April 2018

Decision & Reasons Promulgated
On 17th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

N S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R O’Ryan of Counsel instructed by Greater Manchester
Immigration Aid Unit

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Brookfield (the judge) of the First-tier Tribunal (the FTT) promulgated on 22nd September 2017.
2. The Appellant is a female citizen of Azerbaijan who arrived in the UK on 5th August 2016 and claimed asylum on 8th August 2016. The Appellant fears ill-treatment from the Ministry of National Security (MNS) if returned to Azerbaijan.

3. The asylum and human rights claim was refused on 2nd February 2017, the Respondent not accepting the credibility of the Appellant's account. The FTT heard the appeal on 11th September 2017, and after hearing oral evidence from the Appellant, dismissed the appeal on all grounds.
4. The Appellant applied for permission to appeal to the Upper Tribunal relying upon three grounds which are summarised below.
5. The first ground contends that the judge erred in law by irrationally concluding that the Appellant was not of interest to the authorities in Azerbaijan while accepting that she had been beaten in detention. The Appellant's fear of the authorities was based on two connected elements, those being her experience of being ill-treated in detention when being questioned about the alleged crimes of others, and her fear of being arrested and charged with crimes herself.
6. The judge accepted that the Appellant was beaten in detention and hospitalised but found at paragraph 10(xiii) that the failure of the Azerbaijan authorities to charge her with any offences strongly suggests that she was of no interest to them. The judge found at paragraph 10(xxxiii) that the Appellant was not wanted for criminal charges. It was submitted that having accepted that the Appellant was beaten to the extent of needing hospital treatment, it was irrational to conclude that she was not of interest, and, in particular, to base that conclusion on the fact that the Appellant had not been charged with anything herself. It was further submitted that the conclusion was not adequately reasoned, in that the judge focused on whether or not the Appellant was wanted for crimes committed by herself, rather than the risk of being detained for questioning and the consequent risk of ill-treatment.
7. The second ground contends that the judge made a finding that was irrational, that being the conclusion that the Azerbaijan authorities were "aware that she would not cooperate." The judge's conclusion at paragraph 10(xxxiii) did not incorporate the possibility of the Appellant being of interest in connection with the alleged crimes of others, but the judge did consider this issue and dismissed it on the ground that the authorities knew she would not cooperate. It was submitted that the judge had been inconsistent in referring to the Appellant's claim that she was beaten unconscious at 10(xiii) but found at 10(xi) that the medical evidence did not indicate that the Appellant had been beaten unconscious. It was submitted that it was irrational and as such an error of law to have then relied on this as part of the reason why the authorities would no longer consider the Appellant of interest in respect to the alleged crimes of others.
8. The third ground submits that the judge erred in law by relying on likelihoods without adequate reasoning or evidence contrary to the guidance in HK v Secretary of State for the Home Department [2006] EWCA Civ 1037.
9. It was submitted that the judge erred in law by placing reliance on what was considered to have been likely in the circumstances, without providing either adequate reasoning or evidence on which to base such findings. It was submitted this applied to the rejection by the judge of the Appellant's account of signing an undertaking not to leave the country, but not being required to surrender her passport (paragraph 10(ix)). This also applied to the finding at paragraph 10(xii) that the Appellant was not

of interest to the authorities because she had not been monitored by the authorities while in hospital.

10. Permission to appeal was granted by Designated Judge Peart of the FTT in the following terms;
 - “2. Judge Brookfield (the judge) dismissed the Appellant’s appeal against the Respondent’s refusal to grant her asylum, humanitarian protection and on human rights grounds because he found that the Appellant was not a credible witness with regard to events in her own country and that she was not at risk on return.
 3. The grounds claim the judge erred because his approach was irrational with regard to the authorities’ interest in the Appellant and with regard to their awareness that she would not cooperate. Further, that the judge relied on likelihoods without adequate reasoning or evidence.
 4. I find that the judge’s reasoning that the failure of the Azerbaijan authorities to charge the Appellant with any offence strongly suggested she was of no interest to them notwithstanding the fact that he found that she had been beaten in detention and hospitalised inadequate. It is arguable that given the extent of the adverse treatment which the judge accepted had taken place, the conclusion that she was not of interest because she had not been charged with anything herself was unsustainable.
 5. At 10(xiii) the judge found the investigating officer was ‘therefore’ aware the Appellant would not sign any false statement because she was beaten and yet still refused to cooperate or give false evidence against the curator. Such a finding was arguably irrational. The judge’s overall conclusion at 10(xxxiii) did not incorporate the possibility of the Appellant being of interest in connection with the crimes of others but although the judge considered it and dismissed it on the ground that the authorities knew what she would not cooperate, that conclusion was based on the nature and severity of her ill-treatment.
 6. I find the judge ventured into speculation at [21] – [22] when considering the likelihood of events rather than a close analysis of the evidence and credibility findings, see HK [2006] EWCA Civ 1037.”
11. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

12. On behalf of the Appellant Mr O’Ryan relied upon the grounds contained within the application for permission to appeal and expanded upon them. With reference to the first Ground of Appeal it was submitted that the judge had accepted at paragraph 10(xix) that the Appellant had attended interviews by the authorities on 6th and 21st July 2016. At paragraph 10(xi) the judge accepted that the Appellant had been beaten and hospitalised, and it was irrational of the judge to have made those findings, but then concluded that the Appellant would be of no interest to the authorities. The medical evidence indicated that the Appellant had received significant injuries.

13. With reference to the second ground it was submitted that given the acceptance that the Appellant had been beaten by the authorities, it was irrational for the reasons contained in the written grounds, to conclude that she would not be at risk. It was submitted that authorities who have used illegal force when questioning an individual, could not in fact be expected to act rationally.
14. With reference to the third ground it was submitted that the judge had criticised the expert report for speculating, but had then gone on to speculate as to what was likely to happen in Azerbaijan, without basing those conclusions upon background or expert evidence.
15. It was submitted that the remaining credibility findings made by the judge had been infected by the errors of law described above, which meant that the decision was unsafe. It was contended that the appropriate course would be to set aside the decision and remit the appeal to be heard again by the FTT.
16. Mr Bates, on behalf of the Respondent, advised that there had been no rule 24 response, but it was contended that the judge had not materially erred in law, and therefore the FTT decision should stand.
17. Mr Bates submitted that it was accepted that the judge had found that the Appellant had been beaten, and required hospital treatment, but that the judge had not accepted that the beating was as a result of being interviewed by the authorities, and therefore the judge had not specifically accepted that it was the authorities who had beaten the Appellant. Mr Bates addressed the findings made by the judge at paragraph 10 at some length. In summary it was contended that the judge had given cogent reasons for the findings that had been made, and had considered the evidence in the round, and given sustainable reasons for the conclusions that had been reached. The judge had considered the Appellant's claim, and rejected at every stage, the Appellant's account. It was submitted that the judge was entitled to find that although the Appellant had been interviewed, she would not be at risk from the authorities if returned to Azerbaijan.
18. In response Mr O'Ryan submitted that there had been no specific rejection by the judge of the Appellant's claim that her injuries were caused by the authorities. It was noted that she had been admitted to hospital on 21st July 2016, the same date as she was interviewed.
19. At the conclusion of oral submissions, I reserved my decision.

My Conclusions and Reasons

20. I find an error of law disclosed in the first ground as contended on behalf of the Appellant. I do not accept the submission made by Mr Bates that while the judge accepted that the Appellant had been beaten, the judge had not accepted that this was carried out by the authorities. The Appellant's case as set out in paragraph 9(viii) was that she was questioned on 21st July 2016 but refused to provide evidence against her curator, which resulted in her being threatened with rape and beaten until she lost consciousness. She woke up in hospital where she remained for eleven days. The

judge found at paragraph 10(xi) that the Appellant had attended for interview on 21st July 2016 as claimed, and although the medical evidence did not indicate that the Appellant had been beaten unconscious, it did indicate that she had been “lightly beaten”. The judge “accepted the Appellant was attacked on 21st July 2016 and was admitted to hospital on that date”. While the judge did not actually record that the beating had been given by the police or investigators, it is my view that this is what the judge accepted.

21. The hospital medical report confirms the Appellant was taken to hospital by ambulance at 18.15 on 21st July 2016. On admission it was noted that she had bruising on her face, and also a large bruise on the right side of her abdomen. Further investigations revealed a fractured rib on the right side of her body. The Appellant remained in hospital for eleven days, and left Azerbaijan on 5th August 2018.
22. I do not find that adequate reasons have been given for concluding that the Appellant would not be of adverse interest to the authorities if returned to Azerbaijan. In my view, the fact that the Appellant was not charged with an offence, does not satisfactorily explain why she would be of no adverse interest to the authorities, given the significant injuries caused by the beating she received when interviewed. The judge does not appear to have considered paragraph 339K of the Immigration Rules, which states that the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
23. For the reasons given above, I find that inadequate consideration has been given to the potential risk on return to the Appellant, given the acceptance that she was unlawfully assaulted by the authorities while being questioned.
24. I find there is merit in the second ground of appeal. I do find that it is irrational to consider that the authorities would not ill-treat the Appellant again, as they would be aware that she would not cooperate. I accept Mr O’Ryan’s submission, that authorities who are willing to unlawfully and assault individuals who are questioned, cannot be expected to act rationally. The judge bases the conclusion that the Appellant would not be of further interest to the authorities on the basis that (paragraph 10(xxxiii)) the Appellant claimed that she was beaten unconscious but still refused to cooperate or give false evidence and the investigating officer was therefore aware that she would not sign any false statement. However, at paragraph 10(xi) the judge found that the medical evidence did not indicate that the Appellant had been beaten unconscious. It is therefore irrational to find that she would not be at risk because she had failed to give false evidence even though beaten unconscious, although the medical evidence indicated to the contrary.
25. I also find that there is merit in the third ground of appeal. The judge does criticise the expert who prepared the report for speculation, but in my view does not follow the guidance in HK. At paragraph 28 of HK guidance is given that even if an Appellant’s story may seem inherently unlikely that does not mean that it is untrue. The account

must be considered against the available country evidence and reliable expert evidence and other familiar factors such as consistency. At paragraph 29 the guidance is given that inherent improbability can be a dangerous, or even wholly inappropriate factor to rely on in some asylum cases. The expert report did lend some support to the Appellant's case, but was rejected by the judge, who found that on occasions the expert had speculated. There is an element of speculation in the judge's findings that it was not credible that the Appellant was not monitored at hospital nor that she was not made to surrender her passport.

26. I am therefore persuaded that the judge erred in law as contended in the grounds seeking permission to appeal. I find the decision to be unsafe because of the material errors of law, and the unsafe credibility findings may have affected the other findings made by the judge. I have taken into account paragraph 7.2 of the Senior President's Practice Statements and because credibility is very much in issue, and there is substantial fact-finding to be undertaken, I consider it is appropriate to remit this appeal back to the FTT to be decided afresh with no findings preserved. Because of the nature of the fact-finding that must be undertaken, it is more appropriate for this to be done by the FTT rather than the Upper Tribunal.
27. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FTT Judge other than Judge Brookfield.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order because the Appellant has made a claim for international protection.

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th May 2018

**TO THE RESPONDENT
FEE AWARD**

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

7th May 2018