Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05735/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 4th October 2018	**On 24th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

[S K]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Motteshaw, Counsel
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India born on 1st April 1989. On 19th June 2012 the Appellant had applied for a Tier 4 Student visa which was issued as valid until 15th November 2013. The Appellant took no steps to leave the UK on expiry of her visa and on [~] 2016 her son [S] was born. On 16th May 2017 the Appellant lodged an application for asylum and was served with enforcement papers. The Appellant's claim for asylum was based on a fear that she would be unable to return to India because she would be at risk from family members due to her previous relationship and through the

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birth of her son. Her application was refused by Notice of Refusal dated 19th April 2018.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal A J Parker sitting at Manchester on 1st June 2018. In a decision and reasons promulgated on 19th June 2018 the Appellant's appeal was dismissed on all grounds.

3. On 27th June 2018 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended that the decision was unsafe for the following reasons:-

   - A want of adequacy of reasoning.
   - A failure of the judge to make material findings on the evidence.
   - A failure to properly direct himself in law on the issue of internal relocation.
   - A failure to properly assess risk upon return in light of the apparent positive findings of fact.
   - A failure to have regard to Section 55 of the 2009 Act in the assessment of Article 8 in the light of the position relating to the child [S].

4. On 12th July 2018 Judge of the First-tier Tribunal O'Callaghan granted permission to appeal. Whilst Judge O'Callaghan noted that there was no requirement to expressly refer to Section 55 of the Borders, Citizenship and Immigration Act 2009 within a decision and reasons an assessment as to a child's best interests is a relevant factor within the proportionality assessment and it was arguable that the judge had failed to undertake this assessment.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed Counsel, Miss Motteshaw. The Secretary of State appears by her Home Office Presenting Officer, Mr Bates.

Submissions/Discussion

6. Miss Motteshaw takes as her starting point paragraph 25 of the decision and the Grounds of Appeal pointing out that the judge has clearly applied the wrong standard of proof in assessing the risk on return pointing out that the judge found that "on balance" the Appellant did have problems with her family as claimed but that it was not clear what from the Appellant's narrative had been accepted or rejected in respect of her subjective fear of what might happen to her on return. She points out that the wrong standard of proof has been applied and the correct one should

have been one of what was reasonably likely. She submits that the judge simply did not assess the risk upon return in light of the acceptance of the Appellant's problems with her family in India and whether the Appellant would be at risk upon return in her home area from both her family and others in the community. Further whilst it was accepted that the Appellant having been in the UK since 2012 and having formed a relationship outside marriage and had her child outside marriage, she considered it was difficult to understand why the passage of time and lack of contact would diminish any real prospect of further problems. She submits that the judge has quite simply failed to deal with the threat posed by the Appellant's community in her home area on account of her claimed caste and having a child out of wedlock.

7. Thereinafter Miss Motteshaw contends firstly the judge fails to make conclusions regarding the Appellant's relationship and she refers me back to the Appellant's witness statement and that the judge has gone on to conflate the issues of internal relocation and sufficiency of protection. She takes me to paragraph 26 of the decision pointing out that protection and relocation are separate issues and that if there was a sufficiency of protection in the Appellant's home area then it would be arguable that there would be no need for the judge to consider internal relocation but if there was no sufficiency of protection in the home area then it is necessary for the judge to explain why the issue of sufficiency of protection was relevant to the issue of internal relocation. She consequently concludes that whilst the issue may have been directly identified it was not applied and that the finding at paragraph 33 was a conclusion that was not open to the judge.

8. Further, she submits that there are no clear findings of fact and that the judge has seemingly ignored the Appellant's claim to be of the Chamar caste and that she would face discrimination as a result. She submits that the failure to make any findings about the Appellant's claimed caste and its consequences upon return are in themselves an error. In the alternative she notes that the judge has made one finding, namely that the Appellant would by reason of her high education be able to obtain employment in India but she submits this simply ignores the caste the Appellant is from and in the light of the level of discrimination which is revealed in the background evidence, it is a finding that was not open to the judge to make.

9. Secondly, she takes me to Ground 2 as set out in the Grounds of Appeal pointing out that the judge has failed when assessing Article 8 to determine where the best interests of the child lay and has failed to make a specific consideration or mention of Section 55. She refers me to the headnote of *JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC)* which is set out at paragraph 12 of the Grounds of Appeal and submits that the best interests of the Appellant's son have not been considered and therefore the judge's assessment under Article 8 at paragraphs 35 to 48 are flawed. She asked me to find that there are

overall material errors of law in the decision, to set the decision aside and to remit the matter back to the First-tier Tribunal for rehearing.

10. In response Mr Bates comments that the judge at paragraph 26 has looked at the claim at its highest and even if the judge has erred in her findings at paragraph 25 then he submits that that error is not necessarily material. He submits it is clear the judge gave due consideration to the Appellant's bundle but did not in her findings support the submissions made at paragraph 32 regarding the Appellant being a single mother upon whom it was contended it would be unduly harsh to return. He points out it is accepted that the Appellant is from a wealthy background but wonders where that affects any form of materiality and overall he submits that there are no material errors of law in the decision.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. The thrust of the admissions made on the Appellant's behalf relate to a contention that the judge has made unsafe findings in connection with the risk upon return. The judge has made findings but I accept that the judge has applied the wrong standard of proof at paragraph 25 something which Mr Bates does not seek to push against. His argument is that even if such an error has been made it is not material. I consider that it is because the whole of the decision has to be looked at in the round and the judge falls into error in the manner in which he has assessed internal relocation. I

agree with the submission made by Miss Motteshaw that the judge has seemingly made no reference to the Appellant's caste and the effect that this might have upon her ability to relocate; this being something that the Appellant does rely upon. To that extent there are errors of law which I consider to be material.

14. In addition, whilst acknowledging that the judge has no specific obligation to mention Section 55 of the Borders, Citizenship and Immigration Act 2009 it is necessary as the headnote sets out to follow a certain format and to identify a child's best interests and then balance them alongside other material considerations. The problem in this case is that the judge has failed to mention them at all and consequently there is an error which is material.

15. In such circumstances I find that the decision is unsafe. I set aside the decision and remit the matter back to the First-tier Tribunal. I emphasise however that that is not to conclude that another judge on a rehearing of this matter would not come to exactly the same conclusion as the First-tier Tribunal Judge has in this case.

Decision and Directions

16. The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. Directions are given hereinafter for the rehearing of this matter.

    (1) That on the finding that there are material errors of law in the decision of the First-tier Tribunal Judge the decision of the First-tier Tribunal Judge is set aside with none of the findings of fact to stand.

    (2) The matter is remitted back to the First-tier Tribunal sitting at Manchester with an ELH of three hours to be heard on the first available date 28 days hence.

    (3) That the hearing is to be before any Judge of the First-tier Tribunal other than Immigration Judge Parker.

    (4) That there be leave to either party to file and serve an up-to-date bundle of subjective and objective evidence upon which they seek to rely at least seven days prior to the restored hearing.

    (5) That a Punjabi (Indian) interpreter do attend the restored hearing.

No anonymity direction is made.

Signed   Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed   Date

Deputy Upper Tribunal Judge D N Harris