Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00913/2017
PA/00883/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2019	**On 12 March 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MTR
ZFT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Packer, counsel, Duncan Lewis & Co Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge O'Garro, promulgated on 15 November 2018. Permission to appeal was granted by Deputy Upper Tribunal Judge Davey on 28 January 2019.

Anonymity

2. An anonymity direction is made, as set out at the foot of this decision.

Background

3. The first appellant entered the United Kingdom on 2 October 2009 with entry clearance as a Tier 4 migrant. The second appellant became a dependent partner on the first appellant's claim following their 2014 marriage. Their leave to remain was extended in the same capacity until 30 October 2015. A subsequent application for leave to remain on private life grounds was refused on 8 July 2016 with no right of appeal. The appellants applied for asylum on 6 July 2016.

4. The basis of the first appellant's protection claim was that that he was an active member of the student wing of the BNP and had been suspected of belonging to an armed group. He feared his wife's family who objected to their marriage and also his involvement with the BNP. The second appellant's claim is based on her relationship with the first appellant, whom she was secretly seeing in Bangladesh prior to their marriage. She claimed to fear her family who had wanted her to marry someone else.

5. The Secretary of State refused the claims, accepting only the appellant's nationalities and identities. The appellants' experience of a still-birth and the effect of that on the second appellant's mental health was considered under exceptional circumstances however, the respondent did not accept that her condition met the high threshold required for a breach of Article 3 ECHR.

6. The appellants appealed the decision. Their appeal was heard by First-tier Tribunal Judge SL Farmer and dismissed in a decision promulgated on 1 March 2017. That decision was set aside following a hearing at the Upper Tribunal on 23 May 2017.

The hearing before the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, both appellants gave evidence as did three witnesses. The protection claims were dismissed as the judge did not find them to be credible witnesses whereas the human rights claims were dismissed as the judge considered the public interest concerns to carry the most weight.

The grounds of appeal

8. Permission to appeal was granted on the basis that it was arguable that the judge failed to look at the evidence in the round and having rejected the appellant's credibility failed to have proper regard to the evidence of two witnesses and an expert opinion.

The hearing

9. As a preliminary point, it was agreed by both parties that all grounds may be argued, notwithstanding the indication that permission had only been

granted on the grounds set out in paragraphs 4-8 of the application for permission to appeal.

10. Mr Packer argued, firstly, that had the First-tier Tribunals concerns with her mother's ability to fund the second appellant's travel to the United Kingdom been raised at the hearing, evidence could have been led on the issue. This point had never been raised by the respondent or when the appeal was heard previously. While the judge had found aspects of the appellants' account implausible, on this issue she entirely rejected their account and concluded that the second appellant's brothers were responsible for funding her travel. This amounted to a procedural irregularity, MM (unfairness; E&R) Sudan [2014] UKUT 00105 applied. With permission, Mr Packer adduced evidence in the form of an original agreement for the sale of land and translations, showing the second appellant's mother was sole owner of land and she had disposed of it.

11. The second ground argued on behalf of the appellants was that the judge wrongly approached the evidence contained in the affidavits and expert's report. What she had done was to make negative credibility findings in relation to the appellants' account and use that as a reason for dismissing the remainder of the evidence. The judge had been wrong to state that the expert's conclusions were based on the appellants' account being believed. Thirdly, the appellants' previous appeal had been remitted for a fresh hearing solely on the basis of the judge's error in relation to the timing of their asylum claims and subsequent negative credibility findings. Mr Packer argued that the judge had made the same error, in that she had not appreciated that the asylum claims had been made prior to the refusal of their human rights claim.

12. Ms Cunha argued that the fact that the judge was unaware that the second appellant's mother sold her land to pay for her daughter's travel would have made no difference to the outcome of the appeal. She contended that there was no risk to the appellants as her mother supported the marriage, was head of the household and would have power over her sons. As for the expert evidence, Ms Cunha stressed that the judge had said that she had considered it in the round and she was right to say the questions put to the expert were all on the basis of positive credibility findings. The mistake as to the chronology did not alter the point made by the judge as to the delay in seeking asylum.

13. In reply, Mr Packer noted that the judge had stated there was no evidence regarding how the authorities would know that the appellant had attended BNP meetings in the United Kingdom but the expert had dealt with this issue. The expert had also explained why elopement causes irreparable damage to the reputation of a family. Finally, that the second appellant's mother owned land did not overturn the entire patriarchal structure.

14. At the end of the hearing, I reserved my decision.

Decision on error of law

15. The judge stated in equivocal terms that it was plausible [46] that the first appellant had twice been assaulted by the second appellant's brothers who objected to their relationship. She unequivocally rejected the claim that the second appellant's family maintained their opposition to the marriage. I conclude that the following errors of law were made by the First-tier Tribunal, without which a different conclusion could have been reached.

16. The judge at [52] found that contrary to the appellants' evidence, the second appellant's family reversed their view of the marriage and that her brothers had provided the money for the second appellant's departure from Bangladesh, via the latter's mother.

17. Unbeknown to the judge, the second appellant had provided, with her Tier 4 dependent application, evidence of an agreement between her mother and a friend for the sale of land. That document was not before the judge because the respondent had not raised the issue in the refusal letter. Nor had it been raised during the hearing. While the judge cannot be criticised for being unaware of the existence of this document, the consequences of her finding that the funds came from the second appellant's brothers, led to unfairness owing to a failure to put the point to the appellants. Headnote 2 in MM makes the point that an error of law can arise through no fault of the judge, where material evidence was not considered and which resulted in unfairness. Had the agreement for the sale of the mother's land been provided, it could have led to a different conclusion being reached as to the attitude of the male members of the second appellant's family to her marriage.

18. There is merit in Mr Packer's arguments regarding the judge's treatment of the report of Dr Ashraf-ul Hoque. While the judge stated, repeatedly, that she had looked at all the evidence in the round, when the decision is analysed it is only after rejecting the majority of the appellants' claims that she briefly commented on the expert opinion. She found that the report was of no assistance because the conclusions therein were "*based upon a positive finding of credibility which is not in line with the findings I have reached*."

19. The dozen questions posed by Duncan Lewis to the expert sought a response regarding the plausibility of various aspects of the appellants' claims and in addressing those questions, Dr Ashraf-ul Hoque's provided a wealth of information and opinion, with references, set out over 31 pages and 98 paragraphs. At no stage did he comment on the credibility of the appellants' claims. As well as setting out highly detailed and relevant evidence regarding Bangladesh's patriarchal society and marriages which crossed caste and class boundaries, the expert addressed the importance of student politics in Bangladesh and the issue of the monitoring of political activities in the United Kingdom by the Bangladeshi authorities.

That the judge found there was no evidence of the latter at [61] suggests that little consideration was given to the report.

20. The evidence contained in affidavits from two witnesses received similar treatment to that of the expert. The judge does not engage with the contents of the affidavits and nor are the contents set out elsewhere. At [56], she simply concludes, "*In view of my findings about the appellants' credibility, I will place no evidential weight on* (the affidavits)."

21. The judge accordingly erred in concluding her consideration of the credibility of the appellants' account and then going on to reject the expert and supporting affidavit evidence on the basis of her earlier negative credibility findings.

22. The judge set out the background to the appeals at [3] of the decision and reasons. There it states that the appellants' human rights application was refused on "*18 July 2016*" and that it was on "*18 July 2018*" that they claimed asylum.

23. There are two errors with the summary of the immigration history. The first is that the asylum application was made as late as 2018 and the second was the judge's understanding that the appellants only sought asylum after they had been notified that their human rights claim was refused.

24. At [64], the judge refers to the appellants' failure to raise protection issues with their representative and delay in making their claims. Whereas, the real position was that the appellants claimed asylum on 6 July 2016, prior to the decision on the human rights claims on 18 July 2016. There is a significant difference between a two-year delay in seeking asylum after the last negative decision and having sought asylum prior to a decision on the previous application. There was also a failure by the judge to engage with the reasons the appellants' gave as to why they did not apply for asylum at an earlier stage, that being that they initially planned to pursue settlement on the grounds of long residence and were later advised against mentioning protection issues in their private life applications.

25. As the appeal mainly concerns fears of family members, I have considered whether the errors above are material. It is the appellants' case that the second appellant's relatives are influential within the Awami League and Bangladeshi government. Evidence said to corroborate those claims was before the judge, however there was no reference to it or an indication whether or not it was accepted. Thus it cannot be said at this stage whether or not the appellants could reasonably be expected to seek national protection or internal relocation in order to avoid harm at the hands of the second appellant's male relatives. I conclude that the judge failed to afford anxious scrutiny to the claims and made material errors of law. The decision is unsafe and is set aside in its entirety, with no findings preserved.

26. Mr Packer strongly urged that this matter be remitted to the First-tier Tribunal for a de novo hearing, arguing that the appellants had been deprived of a fair hearing. Mindful of the fact that this matter has already been heard twice by the First-tier Tribunal, I was initially disinclined to remit. Having considered paragraph 7.2 of the Senior President's Practice Statement, I find that the circumstances of this appeal satisfy both of the alternative limbs for remittal. Firstly, the appellants have been deprived of a fair hearing on several bases and secondly, there are no preserved findings, there are at least five witnesses and substantial quantities of supporting and expert evidence which require detailed and extensive judicial fact-finding. I have had regard to the overriding objective in Rule 2 of the procedure Rules but conclude, reluctantly, that remittal is the correct course.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside, with no findings preserved.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of one day by any judge except First-tier Tribunal Judge O'Garro.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed Date 24 April 2019

Upper Tribunal Judge Kamara