Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06859/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 4 April 2019	**On 11 April 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

M M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, instructed by Jain, Neil & Ruddy Solicitors
For the Respondent: Ms M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of Designated Judge Murray promulgated on 25 July 2018, dismissing his appeal against the decision of the respondent dated 20 May 2018.

2. The appellant's case is that he and his partner were at risk from his wife's tribe because they had had a sexual relationship and had plans to marry without permission. Having fled from their home area, they travelled to Hyderabad but were kidnapped and taken back to Karachi. They were

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allowed to marry on condition that they gave the tribe their first daughter and pay a 1 million rupee penalty for dishonouring them.

3. The couple married in 2003 and in 2010 had a daughter. Shortly before she was 4, the appellant brought her and the wife to the United Kingdom, the appellant having been previously granted leave to remain as a Tier 1 (Entrepreneur) Migrant from 2013 until 2016. An application for an extension in that capacity was refused on 18 November 2016 as was an application for reconsideration which was refused on 13 September 2017. On 1 December 2017 the appellant claimed asylum.

4. The Secretary of State did not accept the appellant's account of what had happened to him and his wife in Pakistan nor was it was accepted they were at risk of an honour killing in Pakistan.

5. At the hearing on 2 July 2018 the appellant made an application for an adjournment to permit the arrival of two warrants for his arrest which had been served the day before in Pakistan together with a First Information Report ("FIR").

6. The judge heard evidence from the appellant and his wife as well as submissions from both representatives. The judge concluded that:-

   (i) the burden of proof was on the appellant and the standard of proof was a balance of probabilities [56];

   (ii) if the appellant's account is to be believed, then his appeals will succeed [58];

   (iii) the appellant's credibility was undermined by the delay in this case as was a failure to mention in the screening interview the agreement made between the appellant and his wife and her tribe [59];

   (iv) it was difficult to find that the appellant did not know his wife was a member of Khaskheli tribe, there being an inconsistency as to how she was dressed when they met [60];

   (v) it was more likely based on the objective evidence that the appellant would have been killed when he admitted to having a sexual relationship before marriage to his wife who may also have been killed [63], the judge finding that the terms of the agreement lacked credibility;

   (vi) there is state protection available to the appellant and his wife on return and/or that they could relocate internally [65];

   (vii) because of the lack of credibility throughout the claim she doubted the genuineness of the documents, that is the arrest warrants and FIR, which were not before her it being too much of a coincidence that they would have been served just before the hearing, the appellant possibly trying to bolster his claim by stating that he firmly fears not only his wife's tribe but also the state.

7. The appellant sought permission to appeal on the grounds that the judge had erred:-

   (i) in directing herself to the wrong standard of proof [3];

   (ii) in making a mistake of fact at paragraphs [59] and [62] of the determination in that the appellant had in fact mentioned the order during his screening interview at Q4.1 [4];

   (iii) that the judge had erred in taking Section 8 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 as a starting point for the consideration of credibility;

   (iv) that the judge had failed to exercise anxious scrutiny in correctly recording an incident in which the appellant's wife's family found out of their relationship, stating incorrectly that it was the appellant's family who found out about it and beat him;

   (v) in refusing the adjournment request, and error compounded by the judge making findings with respect to the documents he had sought to adduce through the adjournment.

8. On 19 November 2018 Upper Tribunal Judge Gill granted permission noting that it was at least arguable the judge may have applied the wrong standard of proof in assessing the appellant's credibility.

9. Having heard submissions from both parties, I deal with the grounds of appeal in turn.

10. Ms O'Brien accepted that what is stated at paragraph [56] is clearly wrong but submitted that the judge had simply made a slip, having corrected herself properly when making findings at paragraphs [67] and [69].

11. In response Mr Caskie submitted that there were other bases on which the judge's decision could be impugned in that at [63] the judge had said that it was more likely that the appellant would have been killed indicating a higher test than the correct standard. He submitted further that the self-direction and other findings needed to be seen in the context of the other errors reached by the judge in particular ground 4 (lack of anxious scrutiny).

12. In essence, the Secretary of State's case is that the judge despite the self-direction at [56] did in fact apply the correct standard of proof. But there is equally merit in Mr Caskie's submission that paragraph [67] is somewhat formulaic.

13. Given the self-direction at [58] that credibility was an issue, if not the only issue in this case, the judge stating that if the account were to be believed then he would succeed, then the nature of the apparent error is more significant. On considering the findings made at paragraphs [59] to [64], the judge considers the delay counts against credibility and then goes on at [61] to [63] to reject aspects of the claim in terms which are said to be credible but, are whether the judge found the account plausible.

14. In the circumstances, I am satisfied that the judge did misdirect herself as to the standard of proof and that in itself is sufficient to amount to a material error of law.

15. For the sake of completeness, I consider it necessary to record that I did not consider that the judge improperly made reference to Section 8 of the 2004 Act there being no reason why she was not entitled to rely on delay or to commence her assessment of credibility at that point.

16. Turning to the adjournment request, I bear in mind Ms O'Brien's submission that this is properly reasoned and that it was open to the judge to refuse to adjourn the matter and the reasoning for this was sound.

17. The nature of the evidence in this case was such that it would, apparently, change the focus in that given an arrest warrant had been issued, it suggested that the state would either be used in order to punish the appellant and his wife or for them to be tracked down by the wife's tribe. Given that it was said that the grounds had been served the day before the hearing, the judge's reference to the appellant having been in the United Kingdom since 2014 [8] is not a relevant consideration when considering whether or not to adjourn the case. It is unclear why in the circumstances the judge concluded that the evidence on the file was sufficient for her to determine the appeal given that the new evidence indicated a separate issue which, if proven, would go both as to sufficiency of protection and ability to relocate.

18. Accordingly, I am satisfied that the judge's approach to the issue of the adjournment was also wrong in law.

19. For these reasons, I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law both in the failure to adjourn the case and in the self-misdirection as to the standard of proof. In the circumstances, given that no findings of fact can be preserved there will need to be a fresh fact-finding exercise in respect of all aspects of the appeal, I am satisfied that it would be appropriate, given not least that the failure to adjourn is a procedural error, to remit the decision to the First-tier Tribunal for a rehearing de novo.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal is remitted to the First-tier Tribunal to be heard afresh by a judge other than Designated Judge Murray. For the avoidance of doubt, none of the findings of fact are preserved.

3. I make an anonymity order.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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 8 April 2019

Upper Tribunal Judge Rintoul