Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10416/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 2nd August 2019

Determination & Reasons Promulgated
On 27th August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

NOREEN [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs U. Sood (Counsel), Allied Law Chambers Solicitors
For the Respondent: Mr D. Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge James, promulgated on 15th November 2018, following a hearing at Birmingham on 25th September 2018. In the determination, the judge allowed the appeal of the Appellant on Article 8 ECHR grounds, but rejected it on asylum and humanitarian grounds, following which the Respondent Secretary of State made an application for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a citizen of Pakistan, born on 8th April 1976, and is a female. She appealed against the decision of the Respondent Secretary of State, dated 6th August 2018, refusing her claim for asylum and for humanitarian protection.

The Appellant's Claim

3. The essence of the Appellant's claim is that she has a well-founded fear of persecution on the basis of being a member of a particular social group, namely, a woman, in that she would be killed by her family members on return to Pakistan, upon whom she has brought dishonour by marrying outside her caste. The claim was an extensive and elaborate one.

The Judge's Determination

4. The judge rejected the asylum claim. As she explained, the Appellant had "provided an extensive and complicated narrative". The judge noted that the principal assertion from the Appellant was that "she will be subject to honour crimes on her return to Pakistan", and her "secondary assertion is that her return to Pakistan would breach her rights under the ECHR" (paragraph 27). The judge held that, "at first view it reads like a soap opera, but I have noted the Appellant has provided a great deal of detail that would not usually be found had the narrative been entirely fictional" (paragraph 28). Nevertheless, the judge went on to say that "while these claims were raised during her asylum interview the Appellant has not referred to them in her asylum statement" (paragraph 34).

5. In the end, the judge held that, "I do not find her to be credible" and moreover the judge noted that the Appellant had provided "no reasonable explanation why she did not claim asylum on arrival in the UK in 2006 if her circumstances were as bad as she claimed" (paragraph 34). Indeed, the judge went on to say that the Appellant accepted that "she is not a refugee" and that looking at the evidence in the round, the judge was satisfied that "the Appellant has not shown that there are substantial grounds for believing that, if returned, she would face a real risk of suffering serious harm …" (paragraph 35). The claim was rejected also on human rights grounds as well as on humanitarian protection grounds.

6. Where the judge did allow the Appellant's claim, however, was on Article 8 grounds. The judge observed that the Appellant's husband was a person who was born and brought up in the UK. He was a full-time employee for a cleaning company and he held a position of distribution manager on site. He had worked for this company for more than twenty years. He was a homeowner for more than twenty years. He was a British national. Indeed, the whole of his immediate family lived in the UK. The judge observed that "his primary language is English although he can speak a little Patwari" and that "he can understand Urdu but cannot speak it". In his witness statement, the Appellant's husband "tells me that he has

never lived in Pakistan although he has made four visits – the first being in 2002". His last visit was in 2016. He had visited his grandparents' graveside. He had been providing care and support for his mother but not of the kind that could not be supplied by other persons. (Paragraph 37). The judge concluded that,

> "I am satisfied that that he is to all intents and purposes a British person both legally and socially. He has known no other country apart from brief visits. His whole immediate family lives in the UK and would not be able to provide him with direct support on return to Pakistan. He has some language skills but they are limited. I accept that it is unlikely that he would be able to rely upon any support from the Appellant's family." (Paragraph 38).

7. The appeal was allowed.

Grounds of Application

8. The Grounds of Appeal from the Respondent Secretary of State, were described by the First-tier Tribunal which granted permission, as being "unnecessarily long". Essentially what this said was that there was a lack of adequate reasoning for the conclusion as to the significant obstacles that the Appellant's husband would face upon having to relocate to Pakistan. There was also inconsistency with the adverse credibility findings made in relation to the Appellant's evidence. Moreover, there was a failure to apply the appropriately high threshold to significant obstacles. The judge had also failed to consider Article 8 in the round in the context of Section 117B.

9. On 11th December 2018 permission to appeal was granted. Two essential reasons were given for the grant of permission. First, there was a finding about the husband's inability to speak Urdu, or to continue his current employment remotely from Pakistan, and this was held to amount to very significant obstacles which could not be overcome. It was arguable that this was an error. Second, the judge erred in not considering Section 117B, and the public interest in immigration control, in particular the fact that the Appellant and her husband married Islamically during the period when she was in the United Kingdom unlawfully.

Preliminary Matters

10. A preliminary issue that arose at the hearing on 2nd August 2019, was the submission of a Rule 24 response by Mrs Sood, which purported to resurrect before this Tribunal issues that either had not been previously considered, or had been considered in the Hearing by the judge below, but in relation to which there had been no appeal from the Appellant herself. For example, what the Rule 24 response stated was that the judge had failed to consider the impact of honour based violence on the Appellant from her first forced marriage. This is because she had earlier married and it was likely that the non-recognition of the "Khula" (Islamic female divorce), together with her Sharia – illicit cohabitation with the Sponsor,

since her Islamic marriage to him in January 2015, would expose her to risk in a manner that humanitarian protection ought to have been granted to her.

11. Secondly, the judge had simply failed to set out the details of the oral evidence, which was the Appellant's unchallenged testimony, that she had undergone multiple miscarriages, and that the couple was seeking advice from the NHS so that she could conceive. The Appellant was age 43 and her husband was age 47. Time was running out for them. The matter had been raised during the asylum process (see question 73) and yet it had not been dealt with. Mrs Sood, as Counsel, had relied upon this in her submissions on Article 8 and 12 before the judge below.

12. Mr Mills submitted that this was an argument that ought to have been raised by way of an appeal after the decision of Judge James on 15th November 2018. Instead, it had not been raised within a month as required by the Rules, but was raised more than six months after the original decision. It ought to have been lodged on 11th January 2019 as an appeal. Instead today seven months after the decision it was being raised in oral submissions before this Tribunal today.

13. Mrs Sood submitted that she had on her part acted as quickly as she could but she had not been instructed earlier in this regard, but that in any event, the Rule 24 response had been sent in by 20th July 2019, which was more than a month ago before this hearing. Both sides placed reliance upon the case of **Smith [2019] UKUT 216 (IAT)** which deals with the ability of this Tribunal to indeed consider arguments that, although properly speaking the subject of an appeal before this Tribunal, were being raised for the first time by way of a Rule 24 response.

14. I reserved the matter to the end of the hearing. Having done so, I can give my decision on this as follows. I reject the application by Mrs Sood, although it is well-presented and made, that the Rule 24 response should be allowed to resurrect issues that ought to have been raised by way of an appeal. There are two reasons for this. The first reason is simply the inordinate delay. Even if I accept Mrs Sood's submission that the Rule 24 response had gone on 20th July 2019, this was still some five months after it ought to have gone in on 11th January 2019. In any event, there is no proper reason for the delay in this regard. Second, the matters that are now being raised had indeed been dealt with by the judge, in a proper and way. Insofar as there is an argument that the Appellant would be subject to an "honour crime" it is not the case that this was neglected by the judge. As the judge made clear "the principle assertion from the Appellant is that she will be subject to honour crimes on her return to Pakistan" (paragraph 27). The judge had not found the Appellant to be a credible witness in this regard (see paragraphs 34 to 35). Insofar as there is an argument that the Appellant was undergoing IVF treatment and there had been considerable difficulties, even if this had not been considered, it would not amount to a material error of law on the part of the judge. The issue was considered in **Agyarko [2017] UKSC 11**, as Mr Mills has

helpfully pointed out. In any event, the judge had used a different basis for the objection of the claim. The inclusion of this claim would not have made any difference to the eventual decision.

15. In the judgment in **Smith [2019]** it was made clear that:

> "There is no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the First-tier Tribunal has not refused (wholly or partly) or has not refused to admit, an application for permission to appeal made to that Tribunal …" (paragraph 51).

16. The Tribunal referred to the case of **Ved [2014] UKUT 150**, where the Upper Tribunal had held that:

> "the existence of Rule 7(2)(a) is not in any way to be regarded as excusing Appellants from first applying to the First-tier Tribunal for permission to appeal, before approaching the Upper Tribunal. Indeed, we cannot envisage a situation where the Upper Tribunal would be likely to accept an application for permission from a party to proceedings in the First-tier Tribunal who has chosen not to make any prior application to that Tribunal, whether or not such an application would be out of time. The same is likely to be true where no such prior application is made, as a result of inadvertence." (Paragraph 25).

17. In the case of **Smith** this year, the Tribunal went on to say that,

> "The Upper Tribunal is very unlikely to be sympathetic to a request that it should invoke Rule 7(2)(a), where a person who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that body seeks to challenge that adverse decision only after the other party has been given permission to appeal against the decision in the same proceedings which was in favour of the first mentioned person." (Paragraph 54).

This is indeed the situation here. Indeed, for the reasons that I have given above the application made by Mrs Sood falls for a refusal in any event.

Submissions

18. In his appeal before me, Mr Mills, appearing on behalf of the Respondent Secretary of State, submitted that the judge had failed to provide a reasoned basis for why the Appellant's husband, who was said not to be able to speak Urdu but could understand it, could not relocate to Pakistan if he had to. The judge's determination of the Article 8 issues simply accepted the narrative presented by the Appellant and her husband at paragraph 37 without setting out to explain why, on those facts, there would be "very insurmountable obstacles". This being so, the eventual conclusion (at paragraph 39) that, "I conclude that the Appellant and Mr Banharas would face insurmountable obstacles to enjoying their family life in Pakistan" was irrational.

19. For her part, Mrs Sood submitted that the judge had accepted that the Appellant and her husband had a genuine and subsisting relationship.

They had been living with a disabled parent. The Appellant's husband was providing her with care and support. She was his mother. In addition, the Appellants had undergone multiple miscarriages (see paragraph 3 of the Rule 24 response). The appeal was properly allowed on Article 8 grounds outside the Rules. They were suffering from a handicap "now not an insuperable handicap".

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. This is a case where, even if the judge does take at face value what is being said in terms of the Article 8 aspect of the claim by the Appellant's husband (at paragraph 37), the actual assessment is not undertaken in the context of Section 117B, which requires the judge to factor in the strong public interest in the maintenance of immigration control. This is important because the husband had undergone an Islamic marriage with the Appellant at a time when she was in the United Kingdom unlawfully. The failure to refer to Section 117B is a material error of law.

21. Secondly, the judge's conclusion that, "I am satisfied that he is to all intents and purposes a British person, both legally and socially" at paragraph 38, when referring to the Appellant's husband, does not necessarily mean, that by virtue of that fact alone, that the high threshold standard of there being "insurmountable obstacles", is satisfied. In the same way, the fact that the husband's language skills were limited (paragraph 38) did not necessarily mean that the appeal would succeed on this basis.

22. All in all, although there are conclusions reached at paragraphs 37 to 38, these are reached in the absence of factoring in the Section 117B considerations, and moreover do not disclose a properly reasoned basis for accepting the claim as made on the Appellant's side in relation to Article 8 considerations.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge James pursuant to practice statement 7.2(b) of the Practice Directions.

24. No anonymity direction is made.

25. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd August 2019