



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00199/2020

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On 18th November 2020

Decision & Reasons Promulgated
On 25th November 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

JERR
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K. Wood, IAS
For the Respondent: Mr A. McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of El Salvador born in 1994. He appeals with permission against the decision of the First-tier Tribunal (Judge Holt) to dismiss his protection appeal.
2. The basis of the Appellant's claim was that the families of both he and his wife (ACLR) had been threatened by gangs in El Salvador: they had variously been subject to extortion and accused of being police informants. When the Appellant narrated this claim before Judge Holt it

was not the first time that the case had been ventilated before the Tribunal: his wife had already had her protection appeal dismissed, on common facts, by Judge O'Garro in February 2019. Thus, when Judge Holt came to undertake an assessment of the evidence, she was not the first judge to do so. Directing herself to the authorities of Gustavo Suarez Ocampo [2006] EWCA Civ 1276 and Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702 Judge Holt embarked on her assessment of the Appellant's case.

3. The first thing she noted is that the Appellant had introduced new evidence that had not been a feature of his wife's appeal. There was nothing particularly problematic about that - it simply reflected the passage of time. The most significant development was the claim that in August 2019 the Appellant learned that his brother had disappeared, having latterly returned to El Salvador from Mexico. Judge Holt then made what are in my estimation very cogent and wholly justified criticisms of Judge O'Garro's reasoning in dismissing ACLR's appeal: looking at the background evidence Judge Holt was satisfied that the account advanced was consistent with the country background material and therefore quite plausible. In particular it seemed to her that a family who owned a small business, and had the wherewithal to travel abroad, would be precisely the kind of family who might be targeted by gangs for the purpose of extortion. That is an assessment with which I respectfully agree.
4. The decision then says this [at §26(i)]:

"However, whilst the points above seem to favour the appellant's arguments in the appeal before me, there is one glaring, insurmountable problem with the appellant's case. That is that, at para 43 of her decision, Judge O'Garro says "I also take note of the fact that the appellant's husband's family remains in El Salvador and no evidence has been provided that they have been subject to any problems in El Salvador". It seems from the decision and reasons that the appellant did not attend to give evidence before Judge O'Garro. I do not have the file from the earlier appeal of the appellant's wife. However, Judge O'Garro records [para 20] that [ACLR] adopted her prepared statement as her evidence-in-chief. Therefore, Judge O'Garro's finding at para 43 can only have come from the appellant's wife. It is inconceivable that she made a mistake about the whereabouts of her husband's family as of the date of Judge O'Garro's appeal hearing in February 2019. It is regrettable that the respondent did not highlight this feature at the hearing before me, but I am quite sure that, if Ms ACLR's husband's family had fled to Mexico in November 2018 (as now claimed) then this would have been mentioned in her witness statement and

emphasised at the hearing to corroborate Ms ACLR's other claims"

5. Judge Holt goes on to conduct a very balanced and well-reasoned assessment of the case. At §26(v) she records that as he explained the events around his brother's disappearance the Appellant became emotional "in an entirely natural manner". Of this, Judge Holt concluded:

"I do not know or claim to be able to interpret the appellant's behaviour, however the apparently natural behaviour does not overcome the massive undermining evidence discussed above that the appellant's wife told Judge O'Garro (through her witness statement) that her husband's family were in El Salvador (impliedly unmolested and unthreatened) in February 2019, whereas the appellant told me that his family had been in Mexico since November 2018 and that it was too dangerous for them to return to El Salvador"

6. Those being the findings, the appeal was dismissed for want of credibility. For good measure the Tribunal adds [at §28] "I am satisfied that he can relocate within El Salvador".

The Challenge

7. Permission was granted on the 18th May 2020 by First-tier Tribunal Judge Bulpitt who considered it arguable that a procedural irregularity / unfairness may have arisen in Judge Holt's decision, in that the "glaring insurmountable problem" that she identified, and dismissed the case upon, was never put to the Appellant. He was not asked to explain why the decision of Judge O'Garro might have recorded that his family were safe and well in El Salvador in February 2019, when on his evidence they were seeking refuge in Mexico at that time. Judge Bulpitt makes reference to the decision in Maheshwaran [2002] EWCA Civ 173 to the effect that fairness does not usually require a judge to put to a represented appellant every potential inconsistency, but in some circumstances fairness would require this to be done. Whether a particular course is consistent with fairness is essentially an intuitive judgment which is to be made in light of all the circumstances of a particular case.
8. The first matter to note is that the "glaring insurmountable problem" identified by Judge Holt had not been identified by anyone else up until that point. The hearing before Judge O'Garro had taken place on the 12th February 2019. When the Appellant was interviewed by an immigration officer some 6 months later, in August 2019, he mentioned [at 4.1 of the screening interview] that his family are living in Mexico; at his substantive interview in December 2019 he said that they had moved there "in November last year" [Q13]. Nowhere in these interviews is the

Appellant asked to explain why the evidence recorded by Judge O’Garro was different. The refusal letter is dated the 23rd December 2019 and it is plain that the decision-maker knew about Judge O’Garro’s decision, since it is expressly referred to [at §16]. It is also clear from the face of Judge Holt’s decision that the inconsistency was not relied upon by the HOPO, in either cross examination or submissions, since she says as much: “it is regrettable that the respondent did not highlight this feature at the hearing before me”.

9. The question then arises whether, had the matter been put to the Appellant, he would have been able to provide a reasonable explanation for the inconsistency: was it in fact “insurmountable”, as Judge Holt thought?
10. The answer is provided by two documents appended to the grounds of appeal. These are the witness statements of the Appellant and his wife that were submitted to Judge O’Garro in February 2019. Neither says anything at all about the Appellant’s family being safe and well in El Salvador. The grounds – drafted by the Appellant himself in the form of a signed witness statement – deny that any such evidence was given orally. Rather he identifies the only possible source of Judge O’Garro’s finding as this exchange, recorded in ACLR’s asylum interview on the 9th November 2019, some two weeks before his family allegedly left El Salvador for Mexico:

Q26 What family does your partner have in El Salvador?

A Mother and Father

Q27 Where do they live?

A Lourdes, Colon. That is a high risk area

Q28 Your partner’s family are still there and your mother was able to avoid them (the gangs) so why could you not go back and live with your partner’s family?

A They would not find me immediately, but it is a small country and they are always controlling the areas

11. The Appellant relies on this evidence to submit that had he been asked, he would have been able to provide a cogent explanation of how the inconsistency has arisen: in short, Judge O’Garro’s recording of the evidence as it was in February 2019 was wrong. Her paragraph 43 was a reference back to the position as it had been on the 9th November 2018, and whilst it was true to say that no evidence had been adduced that they had experienced problems since that date, it should be recalled that his wife was unrepresented at her appeal. Had she been asked, she would have explained the position.
12. Before me Mr McVeety readily accepted that these statements, and indeed the Respondent’s bundle, established that Judge Holt’s decision could not

stand. The point had never been taken by the HOPO, presumably because the Secretary of State, being in possession of both files, understood that no contradiction arose. It is clear that Judge Holt found much of the Appellant's case to be plausible and consistent with the country background material, and that her decision to dismiss this appeal was almost entirely premised on what she thought, wrongly, to be a fatal flaw. In these circumstances it was certainly a procedural unfairness that the matter was not put to the Appellant: had it been, he would have been able to give the explanation that he now has. I am satisfied that Mr McVeety was quite right to make the concession that he has. The decision of Judge Holt is set aside.

13. I should add that an additional ground took issue with the "in the alternative" finding of the First-tier Tribunal at its §28 to dismiss the appeal on internal flight grounds. The parties were in agreement that this finding was entirely unreasoned and that it too had to be set aside to be remade.
14. Mr Wood invited me to remit the matter to be heard *de novo* in the First-tier Tribunal. He explained that ACLR has outstanding fresh submissions with the Respondent, and that it would be appropriate to remit the matter with the hope that her case, if refused with reference to paragraph 353 of the Immigration Rules, could be joined with that of her husband. I agree.

Decisions

15. The determination of the First-tier Tribunal contains material error of law and it is set aside.
16. The decision is to be remade in the First-tier Tribunal.
17. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

"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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Upper Tribunal Judge Bruce

18th November 2020

