



IAC-AH-KRL-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/08220/2012

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 November 2013**

**Determination Promulgated  
16 January 2014**

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**Before**

**UPPER TRIBUNAL JUDGE PINKERTON  
UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**MS A B  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss V Laughton, Counsel, instructed by Wilson Solicitors  
For the Respondent: Mr G Saunders, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. In this determination, we refer to Ms A B as the appellant and to the Secretary of State as the respondent. Both parties appeal with permission against the determination of First-tier Tribunal Judge Tipping promulgated on 30 October 2012 in which he dismissed the appellant's appeal against the decision of the respondent to remove her from the United Kingdom on the basis that she was not entitled to asylum but allowed the appeal on the grounds that to do so would be in breach of Articles 3 and 8 of the Human Rights Convention. The appellant submits that her appeal should have been allowed on asylum grounds; the respondent submits that the appeal should not have been allowed on any basis.
2. The appellant arrived in the United Kingdom on 14 June 2006 with her husband and they were granted leave to enter as visitors until 30 September 2006. They overstayed and on 23 August 2011 the appellant claimed asylum, an application which was refused on 6 October 2011. Her appeal against that decision was dismissed by First-tier Tribunal Judge Malone in a determination promulgated on 17 October 2011. Permission to appeal to the Upper Tribunal was refused. Further submissions were made by the appellant's representatives and although these were refused, subsequently permission for judicial review decision was granted. The respondent decided to accept the further submissions as a fresh asylum application. That application was refused on 28 August 2012.
3. The parties' cases are set out in considerable detail in the witness statements, refusal letters and in the determination of Judge Tipping, and there is no need to set them out here in detail.
4. The appellant's case is that she suffers from major depression and complex post-traumatic stress disorder as a result of the abuse to which she has been subjected by her family in India. It is her case that she is at risk of attack from them; in fact her (elder) brother and father have threatened to kill her should she return to India.
5. The respondent's case is set out in two refusal letters dated 28 August 2012 running to 43 pages and 20 pages. Although accepting that the appellant is suffering from and displaying symptoms of depression, despair, distress, vulnerability and low mood, she did not accept the allegations of abuse to which the appellant had been subjected, noting that Judge Malone had found the appellant not to be credible and that her claim for asylum had been fabricated. She was not satisfied either that there are no effective mechanisms to protect the appellant in India and considered it would not be a breach of the United Kingdom's obligations to remove her to India, it being reasonable to expect her to relocate within India.
6. In summary, for the reasons set out in our decision of 26 September 2013 we set aside the decision of First-tier Tribunal Judge Tipping dated 30 October 2012, with none of the findings being preserved except and so far as they relate to Dr Thomas's diagnosis of the appellant's condition.

7. At the reconvened hearing on 5 November 2013 we heard evidence from the appellant's brother, Mr C, as well as Dr Thomas.
8. We then heard submissions. Mr Saunders relied on the refusal letters submitting that there was in this case no Convention reason, given that the appellant fears only her brother and wider family. He submitted that although there might possibly be an Article 3 claim, or an Article 8 claim, that was not a tenable position as there are facilities available to the appellant on return to India. He sought to rely also on the manner of the disclosure of the abuse which militates strongly against the appellant's claim and whilst Dr Thomas's evidence was that such abuse often remains hidden, that was a matter for the panel to assess.
9. Mr Saunders referred us to the Operational Guidance Note, submitting that the notes in this case from the GP indicated a passive suicidal ideation and that there would be help available for the appellant in India. Turning to the evidence of Mr C, Mr Saunders said that this evidence should be treated with caution,
10. Miss Laughton relied on her skeleton argument, submitting that the appellant's credibility and the addition of new material can only be assessed in the light of the medical evidence from Dr Thomas. She submitted that Dr Thomas's evidence was reliable and that she was in a position different from a treating doctor, and had now had the advantage of observing the appellant on four separate occasions.
11. Ms Laughton submitted that viewed as a whole the discrepancies in the appellant's evidence were minor and that the expert reports explain any apparent inconsistency. She submitted that the credibility points raised by the respondent had been fully addressed by the appellant.
12. Ms Laughton submitted that the State would not offer protection to the appellant because she is a woman and accordingly, on that basis, she was a member of a social group. She submitted that the appellant is at risk of violence from family, that violence being serious enough to constitute persecution; that there was in reality no sufficiency of protection for the appellant nor would internal flight be available here, given the appellant's particular circumstances.
13. We then reserved our determination.

### **Decision and Reasons**

14. The starting point in this case must be the decision of Judge Malone and we have approached that decision in light of the decision in **Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702**. We accept that Judge Malone found the appellant not to be credible, and that is a starting point. We accept that the appellant's case is now substantially different from that put before Judge Malone but there has, however, been a substantial amount of subsequent evidence, and medical reports. This evidence could have been produced before, and we accordingly treat it with caution, but for the reasons set out below we are persuaded that the late disclosure is explained both by the nature of the abuse suffered, which is more

extensive than that disclosed to Judge Malone, and the nature of the appellant's psychiatric illness. We have also, again for the reasons set out below, come to a different view of the appellant's credibility.

15. Since Judge Malone's determination the appellant has been interviewed and observed by Dr Rachel Thomas on four separate occasions which has led to the production of four reports. As noted above the accepted diagnosis of the appellant's condition is that she has complex post-traumatic stress disorder with severe panic disorder, and suffers from moderately severe major depressive disorder now with psychotic features.
16. We are satisfied that Dr Thomas, who is a chartered clinical psychologist and psychoanalytic therapist with extensive experience in trauma cases and who works at the Tavistock Clinic, is an expert witness on whom we may rely. Dr Thomas has now given evidence and been subjected to cross-examination both before Judge Tipping and before us and we consider, as did Judge Tipping, that her evidence and views have not been shaken by cross-examination.
17. Whilst we note the submission by the respondent in the refusal letter [36] that Dr Thomas's assessment should have been limited to an assessment of the appellant's medical or mental condition, we consider that it was open to the doctor to consider a possibility of the appellant fabricating symptoms and consistency with claimed events which is an area within her area of expertise. In essence what Dr Thomas was being asked to do was to make an assessment of how the diagnosis would affect the appellant's ability to recall consistently what had happened to her and to identify the difficulties she may have in giving an accurate retelling of events as they related to her. Given that both of these matters can flow from psychological conditions it was open to Dr Thomas, and indeed was incumbent on her, to give such an assessment.
18. We do not accept the assertion of the respondent that Dr Thomas has been partial. She has, we accept, taken a view that the appellant needs support and therapy, but that is not, we consider, anything more than the professional commitment to be expected from an experienced psychologist. She has, in her reports, shown a proper clinical detachment which we find has not been affected by any subjective concern for the appellant.
19. We accept Dr Thomas' evidence that she has experience of people who have tried to pretend psychological illness and that it would be very difficult, if not impossible, for a lay person to feign psychological illness given that they would have to feign clusters of multiple symptoms. This would be difficult for a lay person who would not know the manner and patterns of symptoms in which the illness that they were attempting to portray would manifest themselves. Further, there is no indication that Dr Thomas's diagnosis is inconsistent with the observations of the appellant's GP who has seen her on numerous occasions. We note also, that Dr Thomas's diagnosis has been consistent throughout, albeit that the appellant's symptoms have worsened more recently.

20. We are satisfied from Dr Thomas's report that the appellant's manner has been entirely consistent with someone who has suffered complex and severe trauma; who suffers from depression secondary to extremely frightening, cumulatively damaging life events; who has been recurrently traumatised and hit; has suffered excessive repetitive trauma and abuse. We note also from the appellant's medical records maintained by her GP in the United Kingdom support Dr Thomas's diagnosis, although, naturally, they are not as detailed as Dr Thomas' reports.
21. We accept that, as Miss Laughton submitted, the relationship between the appellant and her brother is somewhat strained. We intend no disrespect to either in concluding that their relationship is not that close and is strained due to the appellant being traumatised and seriously psychiatrically unwell.
22. In her second and subsequent reports Dr Thomas has set out a sufficient and adequate rebuttal of the points made against her by the respondent.
23. We have considered the evidence of Mr C and find that he is someone on whose evidence we can rely. We accept that he has provided evidence that the appellant has only one elder brother and that he is a younger brother. He has confirmed the appellant's account that their father was violent and would beat the appellant, as would their elder brother A. He also confirms the appellant's evidence that she was beaten by her husband, in that he describes the appellant having bruises and sometimes a black eye when she was living with her husband. He has also confirmed that the family believe that she has brought shame on them by separating from her husband and has also confirmed the threats made to her by their father and A.
24. We accept that the respondent has identified a substantial number of apparent discrepancies in the appellant's account of what has happened to her both in India and in the United Kingdom. These are set out in considerable detail in the refusal letters, as are the rebuttals provided in the statements from the appellant dated 26 January 2012 and 10 October 2012. We do not consider that any purpose is served by setting them out here in extensive detail.
25. The appellant has explained satisfactorily the discrepancies insofar as the respondent alleges them in respect of the number of siblings she has and in relation to the older brother A when viewed in the light of the observation from Dr Thomas that the appellant's psychiatric ill health makes it difficult, if not impossible, for her accurately to recall details. Bearing in mind the lower standard of proof and given the extent to which her account is in its core confirmed by the evidence both of Dr Thomas and the appellant's younger brother, we do not consider that the apparent discrepancies are material and we find that we are satisfied that the appellant was physically abused by her father and later her husband; that she separated from her husband; and, that her father and brother, A, have made threats to kill her were she to return to her home area.

## Conclusions

26. On the basis of the facts that we have found, we are satisfied that the appellant is at risk on return to India in her home area. We accept that as she has suffered severe abuse at the hands of her husband she could not return to him or to his family and we accept that she could not return to her parental family given that she is viewed as having brought shame on them. Given the actions of her father and brother A in the past, we consider that the appellant would be at significant risk of violence from either or both of them. We find that there are no other relatives to whom she could turn for support, nor friends. She does, we accept, have two sons who are teenagers but we find that they are being looked after by her family and are not in a position to assist her.
27. We conclude, therefore, that the appellant could not return home without the risk of being attacked by her family. We find that the severity of the likely attacks is serious enough to constitute both persecution and engage article 3 of the Human Rights Convention. We have therefore considered what other options would be open to her, that is, protection from the authorities and/or relocation.
28. The appellant is not at risk from the State, but there are significant factors in her case which make it unlikely, if not impossible, for her to access support, not least of which is her psychiatric illness which makes it difficult for her to explain what has happened to her and would inhibit significantly her ability to engage with the police in India.
29. We accept from the OGN and also from the expert report (Appellant's bundle, 255ff) that domestic violence continues to be a problem in India and that whilst domestic violence, cruelty and unlawful harassment is criminalised, it continues despite legislative efforts to combat it. There is significant evidence (see OGN at 3.13.18) that the police are reluctant to register complaints of violence against women and there are reports that the police themselves are perpetrators of sexual abuse. We consider that this is consistent with the report of the expert which indicates that the police are frequently unwilling to involve themselves in what they see is a private matter and sometimes refuse to register complaints. The conclusion reached in the OGN is as follows:-
- 3.13.9 Those experiencing or fearing domestic violence or other forms of gender based violence are able to seek protection from the Indian authorities. However, given the lack of law enforcement safeguards, including the refusal to register domestic violence complaints, discriminatory attitudes held by the police, failures in conducting effective investigations and corruption, each case should be considered on its individual merits to assess whether effective protection will be provided. Additionally, some women's ability to access this help and assistance may be further limited by such factors as their location, lack of literacy and lack of awareness of their rights in what remains a patriarchal society
30. This is consistent with the evidence in the appellant's bundle that domestic violence is widespread (pages 260, 320 341); that the police are reluctant to register complaints

of violence against women (290-291); that battered women are usually returned to their abused family members of reconciliation (290, 364)

31. As a single woman without education and with significant mental ill health it would be unduly harsh to expect her to relocate, given that she would not be able to go to stay with extended family or friends and would not be able to access treatment for her continuing psychiatric ill health without significant difficulty. We accept also Dr Thomas's conclusions that even if the appellant did not commit suicide her mental health would on return to India deteriorate to such an extent that she would be unable to support herself as a lone woman and that she would not have the psychological wherewithal to make use of the refuges in India as her psychiatric state will be too acute to enable her to do so. Further, we note the evidence of the expert, Ms Khan, which was not directly challenged by the respondent, that (AB, 271) that the help given by shelters is temporary in nature, and neither shelters nor local NGOs would be able to assist with her mental health needs, or with finding employment.
32. We find, bearing this in mind, that given this appellant's particular vulnerability, that she would not be able to rely on the protection of the police, nor be able to pursue legal remedies. We consider that given the considerable vulnerability of the appellant due to her psychiatric illness, her functional illiteracy and lack of education, facts which we accept, she is unlikely to be able to access effective protection.
33. In assessing whether she faces ill-treatment for a convention reason, we bear in mind that she is a muslim woman from a traditional background. She has been ostracised by her family, and is seen by them as a source of shame, given that her marriage has failed.
34. The House of Lords addressed the issue of particular social group in Fornah & K v SSHD [2006] UKHL 46. Lord Bingham set out the provisions in the Qualification Directive and then commented [16]:

*Reasons for persecution*

I Member States shall take the following elements into account when assessing the reasons for persecution ...

- (d) a group shall be considered to form a particular social group where in particular:
- [(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
  - [(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
  - [(iii)] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article."

Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published *Comments* on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met.

35. We accept that having been subjected to domestic violence is capable of being an innate characteristic (see *In re B* [2005] 1 WLR 1063, per Baroness Hale at [37]) as would, for that matter, women who had been separated from their husbands. That is not something which could be changed. We accept also the submission that, on the basis of the expert evidence of Ms Khan that separated women in India are seen as distinct and are stigmatised by the community in general. We accept that, and the shame she is felt to have brought are why she faces ill-treatment, and also why she would not obtain assistance from the authorities.
36. Further, while the factual matrix here is slightly different from that identified in **BK India**, we consider that women from her society ostracised by family would be treated as different, and thus constitute a particular social group. We make it clear that it is not the ostracism which constitutes persecution, but it is the lack of assistance that the appellant is likely to receive from the Authorities which flows from that.
37. On either of these bases, the appellant faces ill-treatment on account of her membership of a particular social group. Accordingly, we are satisfied that the appellant has a well-founded fear of persecution in India and that returning her there would be in breach of the United Kingdom's obligations pursuant to the Refugee Convention. It follows from this that her return to India would also be in breach of the United Kingdom's obligations pursuant to Article 3 of the Human Rights Convention.
38. For these reasons, this appeal falls to be allowed. In the circumstances therefore it is unnecessary for us to consider whether the appellant is at risk of suicide on return to India. As we have found that she is entitled to refugee status, she is not entitled to humanitarian protection.

### **Anonymity**

39. We have decided to maintain the anonymity direction in this matter given the likely serious, detrimental effect on the appellant were her identity to become known

already serious mental ill-health. For that reason, we have referred to the witnesses of fact (as opposed to the expert witnesses) by letters only.

**SUMMARY OF CONCLUSIONS**

- 1 The decision of the First-tier Tribunal involved the making of an error of law, and we set it aside.
- 2 We remake the decision by allowing the appeal on Refugee Convention grounds and under Article 3 ECHR.
- 3 We formally dismiss the appeal on Humanitarian Protection Grounds.

Signed

Date: 14 January 2014

Upper Tribunal Judge Rintoul