



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08449/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 20 January 2014

Decision Sent
On 17 February 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S B
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford instructed by HRS Solicitors LLP
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Pakistan who was born on 16 May 1976. She arrived in the United Kingdom on 4 February 2012 together with her son. On 10 May 2012 she claimed asylum. The basis of the appellant's claim was that after she came to the UK she had a relationship with her cousin which resulted in her becoming pregnant. Her second son was born on 7 November 2012 in the UK. The appellant feared that if she returned to Pakistan then her husband would kill her because she had had a baby by another man whilst in the UK. In addition, she claimed that she was separated from her husband in Pakistan because of domestic violence.
3. On 16 August 2013, the Secretary of State refused the appellant's claim for asylum, for humanitarian protection and on the basis that her removal would breach Art 8 of the ECHR. On that date, the Secretary of State made a decision refusing to vary the appellant's leave to enter as a visitor.
4. The appellant appealed to the First-tier Tribunal. Following a hearing on 7 October 2013, Judge Page dismissed the appellant's appeal on all grounds. He rejected the appellant's evidence that she had been the subject of domestic violence in Pakistan and that her relationship with her husband had broken down and they had separated. Further, the judge rejected the appellant's account that she had had a relationship with her cousin in the UK and as a result had become pregnant. Consequently, the judge was not satisfied that the appellant was at risk on return to Pakistan and so he dismissed her appeal on asylum grounds and also under Art 8 of the ECHR.
5. The appellant sought permission to appeal to the Upper Tribunal, in essence on two grounds. First, the judge had erred in law in failing to adjourn the appeal at the request of the appellant who was unrepresented at the hearing. Secondly, the judge failed to take into account the country guidance in relation to the position of women in Pakistan, in particular the case of KA and Others (Domestic violence – risk on return) Pakistan CG [2010] UKUT 00216 (IAC).
6. On 31 October 2013, the First-tier Tribunal (Judge J Grant-Hutchison) granted the appellant permission to appeal. Thus, the appeal came before me.

The Submissions

7. First, Ms Radford, who represented the appellant, submitted that Judge Page had been wrong in law not to adjourn the hearing in order to allow the appellant to seek legal representation. She submitted, relying on the Court of Appeal's decision in SH (Afghanistan) v SSHD [2011] EWCA Civ 184 that the issue was not whether it was open to Judge Page to refuse the adjournment but rather whether the proceedings were, as a result, unfair. Ms Radford, in essence, made two discrete arguments. First, she submitted that it was not the appellant's fault that her legal representatives had only told her one working day before the hearing that they were unable to represent her. Ms Radford submitted that the judge was required to do more than satisfy himself, as he had set out in para 21, that the appellant had told the Home

Office all the reasons why she was claiming asylum. Ms Radford submitted that it was incumbent upon Judge Page to make further enquiry of the appellant about the prospect of the appellant obtaining legal representation, including appealing against the refusal of legal aid. Ms Radford submitted that it could not be fair to continue with the appellant acting in person given that the respondent was represented by an experienced Presenting Officer. Ms Radford relied on the fact that the appellant would not have had time to prepare her case and also she had with her her baby who was distracting. Further, Ms Radford submitted that there were a number of matters raised by the judge in his determination which, if the appellant had been represented, her representative could have dealt with, including the country guidance case of KA and Others which the appellant would have had enormous difficulty in dealing with.

8. Secondly, Ms Radford submitted that the judge had erred in law by assessing the appellant's credibility in the absence of the background evidence, in particular in relation to the prevalence of domestic violence in Pakistan. Ms Radford pointed out that the judge had specifically declined to "embark upon a detailed analysis of the evidence as to the current situation in Pakistan" (see para 35) because, in his judgment, the appeal turned upon the appellant's credibility and that if her account were true she was at risk on return.
9. On behalf of the respondent, Mr Richards submitted that there had been no procedural unfairness. He submitted that in order to adjourn the appeal, the judge would have had to speculate that the appellant would be able to obtain legal aid as the appellant had stated she could not (at least then) afford "private representation". Mr Richards submitted that the judge had no other option but to proceed with the hearing. He submitted that the judge allowed the appellant to put her case and the judge simply did not believe her. Mr Richards submitted that the judge had given ample reasoning as to why he did not accept the appellant was a witness of truth.
10. Secondly, he submitted that the judge clearly had in mind the background material with regard to domestic violence and KA and Others which had been supplied in the respondent's bundle.

Discussion

11. The judge dealt with the appellant's application to adjourn the hearing at paras 19-21 as follows:

"19. At the start of the hearing the appellant asked for her case to be adjourned so that she could find a solicitor to represent her. She had believed a solicitor would represent her but she had learned on Friday 4 October that she would not be granted legal aid. I noted that a Senior Immigration Judge had refused this application on 20 September 2013 giving the reason that no legal representative had agreed to act. Crowley & Company Solicitors wrote on 6 September 2013 to advise that they had lodged an appeal on behalf of the appellant on a pro bono basis and asked that the Tribunal records be amended as they were no longer instructed by her. The solicitor took the view that her case had a 50 per cent

chance of success. She was dependent on legal aid as she could not afford private representation.

20. Paragraph 21(2) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 requires that the Tribunal shall not adjourn a hearing of an appeal on the application of a party unless satisfied that the appeal cannot otherwise be justly determined.

21. I asked the appellant if she was satisfied that she had told the Home Office all of the reasons why she was claiming asylum and she confirmed that she was satisfied. The appellant's case was not complex and did not require any legal research. I was content that the appellant's asylum interviews could stand as her evidence-in-chief and that the appeal could justly be determined without an adjournment; particularly in these circumstances as legal aid had been refused. I refused the application to adjourn."

12. At para 22 the judge referred to how the hearing proceeded, given that the appellant had a young baby with her as follows:

"22. The appellant amplified the contents of her asylum claim in evidence before me, in a hearing where the appellant was granted breaks when necessary to look after her baby. The hearing proceeded without difficulty."

13. I accept that the central issue is one of fairness, whether reflected in rule 21(2) of the First-tier Tribunal's Procedure Rules – whether the appeal "cannot otherwise be justly determined" – or as a matter of common law fairness (see AK (Iran) v SSHD [2008] EWCA Civ 941 *per* Sedley LJ at [25] and SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 *per* Moses LJ at [13]).

14. To the extent that Ms Radford's submission embraces the notion that there is an inherent inequality of arms where the respondent is represented but the appellant is not in an appeal, I reject that submission. Nothing in the Procedure Rules or in AK (Iran) supports such a proposition. In AK, Sedley stated (at [25]):

"There is...no inalienable right to representation."

15. Each case must necessarily turn upon its own circumstances. It is the common experience in immigration and asylum appeals that in a substantial number of cases an appellant is not represented but, even without that representation, the appeal proceedings are patently fair. The mere fact that the appellant had, as she claims, only been informed one working day before the hearing that she would not be represented does not inevitably mean that the proceedings were unfair because she was not able properly to represent herself with, to the extent necessary, the assistance of the judge to present her appeal. To the extent that it is suggested that the judge was required to enquire whether the appellant would be able to obtain legal aid and therefore legal representation in the immediate future, the fact of the matter is that she did not. There is no evidence that her (previous) representatives, Crowley & Co were seeking to appeal against the refusal of the grant of legal aid. It is also noteworthy that Crowley & Co wrote to the Tribunal on 6 September 2013 indicating to the Tribunal that they were no longer instructed by the appellant. It seems that the appellant was aware that representatives (who were Crowley & Co throughout)

could not represent her when in her signed "Reply Notice" to the Tribunal dated 18 September 2013 she stated that:

"My solicitor has withdrawn from my case. I need an adjournment of 28 days to find a new representative and obtain CLR for my application."

16. The judge enquired of the appellant whether there was any aspect of her claim that she had not told the Home Office and she confirmed that there was not. It was pure speculation whether the appellant, given that she told the judge she could not then obtain private representation, would be able to obtain legal aid for representation in the immediate future. The judge took into account that the appellant had a young baby with her and, as he pointed out in para 22 of his determination, he granted breaks in order for the appellant to look after the baby and, he records, the hearing proceeded "without difficulty". Even though the appellant in her witness statement says that her son was in her arms throughout and at one point he fell down which was distracting, given that the judge was alive to the difficulties faced by the appellant of representing herself with her young baby present, I am not persuaded that the appellant was unable to represent herself.
17. This was not an obviously complex case which turned upon the question of the appellant's credibility. In these circumstances, it was not inherently unfair for the judge to refuse the appellant's application for an adjournment and to proceed in the absence of representation.
18. Additionally, Ms Radford submits that the appellant was, in effect, put at a disadvantage during the hearing in giving her evidence and in dealing with the issues raised. Initially, Ms Radford (on the basis of the grounds) submitted that the judge had acted unfairly by not allowing the appellant to make any closing submissions. In her statement, the appellant (at para 2) states that she does not remember being asked to make any arguments in support of her claim. Having read the judge's Record of Proceedings, Ms Radford accepted that she could no longer rely on this as the appellant had clearly made submissions on her case at the end of the hearing. I see no basis for suggesting that the judge conducted the hearing other than in a wholly fair manner.
19. In her submissions, Ms Radford sought to identify a number of passages in the judge's determination which, she submitted, if the appellant had been represented, could have been dealt with by the representative and therefore, in the absence of representation, the hearing was unfair.
20. Although Ms Radford did not seek to argue that these matters in themselves amounted to an error of law, taken with the second ground upon which Ms Radford seeks to rely, namely the failure to consider the background evidence in the country guidance case of KA and Others, I am satisfied that the judge's decision cannot stand.
21. First, in para 35 the judge states that: "I can safely discount any possibility of the appellant's evidence about getting pregnant by her cousin [MB] being true."

22. To support that conclusion, the judge essentially relied upon three reasons. First, he relied upon discrepancies in the appellant's oral evidence concerning her cousin's name which she initially (consistently with her interview) gives as "BM" and then, when asked why he had less names than her husband, she said his name was "BMMN" (see paras 26 and 37-38). Secondly, the judge doubted that the claimed relationship between the appellant and her cousin took place as he did not accept that it is plausible that her cousin would be painting her brother's house (which is where she claims that she conceived her child) because her cousin did not live in the same area as her brother but lived some distance away. Thirdly, in para 36 the judge rejected the appellant's evidence that her husband had last entered the UK in 2005 on the basis that:

"Her evidence is not conclusive of that because I did not find the appellant to be a credible witness in describing the circumstances in which she became pregnant".

23. The judge then continued:

"I am not satisfied to the low standard of proof that she has had a baby in the United Kingdom fathered by her cousin [BM]. If I cannot be satisfied to the low standard of proof of her basis of claim then I cannot be satisfied that the appellant has told the truth in claiming that her marriage to her husband is over by reason of domestic violence or that he is in Pakistan where he would do her harm upon return. So it follows that I cannot be satisfied that he is not the father either."

24. In my judgment, those latter two reasons and the progression to reason that he doubted the appellant's claim in para 36 cannot stand up to scrutiny.
25. First, it is not inherently implausible that even if the appellant's cousin lived "some distance away" (which is in any event vague and undefined) that he would not be present in the house of the appellant's brother painting it at his request. It does not appear that this issue was explored with the appellant in her evidence. It was not, in my judgment, an adequate reason to doubt the core of her claim based upon a sexual relationship with her cousin.
26. Secondly, it was pure speculation to infer that because the appellant's husband had been granted entry clearance in the past, then despite the appellant's evidence to the contrary, he could have been in the UK in 2012 and so could have been the father of the appellant's child.
27. Thirdly, if these reasons were insufficient to doubt the appellant's evidence about her relationship with her cousin, it did not follow (even if it could otherwise) that the appellant's evidence that her marriage to her husband was over as a result of domestic violence was not a matter on which she was to be believed. The only independent reason justifying that finding is at para 42 where the judge doubted that, if the appellant were a victim of domestic violence, her husband would have given her permission to bring her first son to the UK with her. This was not a matter which appears to have been put to the appellant in her oral evidence.

28. In addition, the judge made his adverse finding, in particular in relation to her claim to be the subject of domestic violence, without any reference to the background evidence as set out in KA and Others. The background evidence was certainly a relevant matter which a judge should take into account in assessing the credibility of an individual's account.
29. It may be, despite the consistency of the background evidence with the core of an individual's claim, that an individual's evidence is so unworthy of credit due to, for example patent and inexplicable inconsistencies or obvious untruths that the individual is a person who cannot be believed on any issue and a judge would be entitled, despite the consistency with the background evidence, to reject the appellant's account. Here, however, the judge's reasoning that led him to reject the appellant's account is not sufficiently robust to fall into that category of case. In other words, the background evidence may have made a difference to the judge's conclusion on whether the appellant had established a significant part of her account, namely that she was the subject of domestic violence in Pakistan.
30. For these reasons, although I do not accept that the judge acted unfairly in refusing the appellant's request for an adjournment to be legally represented, his reasoning is inadequate to sustain his adverse credibility finding. To that extent, the First-tier Tribunal's decision involved the making of an error of law and it cannot stand.
31. Both representatives agreed that, if an error of law were established, this was an appropriate case to remit to the First-tier Tribunal in order that the appeal can be heard *de novo*.
32. Having regard to para 7.2 of the Senior President's *Practice Statement* and to the extent and nature of fact finding required, I agree that that is the appropriate disposal of this appeal.

Decision

33. The decision of the First-tier Tribunal involved the making of an error of law. Its decision cannot stand and is set aside.
34. The appeal is remitted to the First-tier Tribunal (to be heard by a judge other than Judge Page) *de novo*.

Signed

A Grubb
Judge of the Upper Tribunal