



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

Appeal Number: AA/03463/2014
AA/03464/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 January 2015**

**Decision & Reasons Promulgated
On 4 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

N. F.

M. N.

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mackenzie, Counsel instructed by Luqmani Thompson & Partners, Solicitors

For the Respondent: Ms Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are mother and daughter, and citizens of Afghanistan. The Appellants sought, and were refused entry clearance on 3 February 2012 as dependent parent and dependent sibling respectively [ApB pB100-]. The relatives

they sought to join were two adult sons of the First Appellant, settled in the UK, who were said to be supporting the Appellants financially. These sponsors were not as a result of successful claims to asylum, and it is accepted that their passports record that both have separately, and recently, travelled by air to and from Afghanistan.

2. The appeals of the Appellants against the refusal of entry clearance to them were dismissed by the First Tier Tribunal in a Decision promulgated by Judge Nightingale on 20 September 2012 [ApB pB103-] The Appellants each had of course produced their own lawfully issued Afghan passports when they made those applications for entry clearance.
3. Following exhaustion of their appeal rights the Appellants entered the UK illegally, separately, by air on 18 May 2013 and 21 June 2013 respectively. Each claimed asylum upon arrival and failed to produce the travel documents used to board the flights they had used, claiming to have destroyed them.
4. The Appellants' case was that as women who were without male support in Afghanistan they each faced a general risk of harm from non state agents in the event of a return to Afghanistan, against which the authorities would be unable or unwilling to provide protection. As a specific risk of harm they said they each faced threats of violence from the circle of a man who had expressed the intention of taking the Second Appellant as his wife against her will; so that she faced abduction and rape, and her mother faced violence if she tried to prevent that.
5. The asylum claims were refused on 2 May 2014, when the Respondent made removal decisions to Afghanistan in relation to both women on the basis that they were illegal entrants. The Appellants' appeals against those removal decisions were heard and dismissed by Judge SJ Clarke in a Decision he promulgated on 19 October 2014.
6. In the course of that Determination the Judge made a series of adverse findings to the effect that elements of the Appellants' accounts were implausible, ultimately rejecting as incredible the Appellants' account of their experiences.
7. First Tier Tribunal Judge Ford granted the Appellants permission to appeal that decision on 9 December 2014 in relation to the challenge advanced to the Judge's approach to the Article 8 appeals. Since it was not entirely clear from that decision whether he had granted, or had refused, permission to appeal in relation to the challenges advanced to the Judge's approach to the asylum and Article 3 appeals – although his decision could be read as a refusal – the Appellants renewed their applications for permission to appeal to the Upper Tribunal. On 21 January 2015 Upper Tribunal Judge Coker granted permission on all of the grounds.
8. The Respondent filed a Rule 24 Notice on 18 December 2014, stating that she opposed the appeal on the basis there was no error of law in the Judge's approach to the evidence, but could say nothing of substance because she had mislaid her files. Neither party applied for permission to adduce further evidence.
9. Thus the matter comes before me.

The documents relied upon by the Appellants as corroboration

10. It is common ground before me that the Respondent placed before the First Tier Tribunal a bundle that was unlikely to assist the Judge hearing the appeals. Such pagination as exists in that bundle (which is neither complete nor sequential) suggests very strongly that the bundle has been the victim of some mishap in the course of its compilation, and that a number of the documents listed in the index to it, have in fact been omitted from it.
11. Marked as pages 76 and 78 appear the translations of two documents that the Appellants relied upon (77 and 79 are copies of the original photocopies relied on). They bear the dates of 13 October 2012 and 14 October 2012 respectively, and they are said to have been issued to one of the sons of the First Appellant as a result of his approach in person to the Afghan authorities for assistance in gaining some state protection for his sister, the Second Appellant, against the unwanted advances of her suitor and the violence his circle had already demonstrated towards both of the Appellants. These documents were produced to the Respondent in support of the original asylum claims. They were relied upon before Judge Clarke as corroborative evidence of the account given by the Second Appellant and her brother in oral evidence.
12. Put simply Judge Clarke made no reference to the existence or content of these documents in the course of the reasoning offered for the rejection of the evidence of the Second Appellant and her brother as untrue. No specific findings were made in relation to the weight that could be attached to their existence or content. Indeed the parties are agreed before me that the only reference to them in the Decision is to be found in the bald statement at paragraph 5; "*The Appellants provided original petitions to the Respondent.*" Leaving aside the criticism that this description may not even properly represent their nature and content, I am satisfied that on a fair reading of the Decision as a whole the impression is given that Judge Clarke has otherwise simply overlooked their nature and content.
13. I accept as Ouseley J did in CJ (on the application of R) v Cardiff County Council [2011] EWHC 23, the importance of the approach in Tanveer Ahmed v SSHD [2002] Imm AR 318. Documentary evidence along with its provenance needs to be weighed in the light of all the evidence in the case. Documentary evidence does not carry with it a presumption of authenticity, which specific evidence must disprove, failing which its content must be accepted. What is however required is its appraisal in the light of the evidence about its nature, provenance, timing and background evidence and in the light of all the other evidence in the case, especially that given by the claimant. That simply did not occur in the course of these appeals.
14. In my judgement Judge Clarke ought to have taken the findings of fact made by Judge Nightingale in September 2012 as his starting point. Those findings dealt with the circumstances in which the Appellants were living in Kabul at the date of refusal on 3 February 2012, and indeed the decision also records the evidence presented to the Tribunal about the circumstances at the date of hearing.
15. Judge Clarke ought to have considered those findings, and that evidence, in the light of the evidence that he was presented with concerning the deterioration in the First Appellant's health, and, the evidence concerning the deterioration in the

Appellants' safety within Kabul; SSHD v D (Tamil) [2002] UKIAT 702. There were plainly two limbs to the Appellants' case before Judge Clarke, in relation to the risk of harm that they were said to face in the event of return to Kabul; the general risk as women who were without the support of male family members living in Afghanistan, and the specific as women who faced a risk of harm from the circle of a man who had expressed the desire to take the Second Appellant as his wife against her will. Both needed to be addressed.

16. Whilst I am satisfied that it would have been open to Judge Clarke to have decided to place little weight upon the nature and content of the two documents [pp76 & 78], if that had been his starting point, and thus if there had been an analysis of the evidence given to Judge Nightingale by the brother of the Second Appellant at the hearing in September 2012, it would be quite wrong of me to simply assume that this would necessarily have been the course taken. Equally, whilst the evidence would appear to have allowed the Tribunal to find that in truth the Appellants faced no risk of harm upon return either because they were not in fact living in Kabul without male support, or for some other reason, it would be quite wrong of me to simply assume that this would necessarily have been the course taken.
17. I am satisfied that Judge Clarke's approach to the evidence was such as to render the Decision unsafe, because material evidence was not taken into account. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, as requested by the Appellants. In the circumstances of the appeal I am satisfied that this is the correct approach, and I note Ms Kenny does not seek to suggest otherwise given my decision above, which I reached during the course of argument. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for his case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012.
18. Having reached that conclusion, with the agreement of the parties I make the following directions;
 - i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal. The appeal is not to be listed before Judge SJ Clarke. The appeal is to be listed at Taylor House on the first available date allowing 3 hours with a Dari interpreter booked for that hearing.
 - ii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Decision

19. The Determination promulgated on 19 October 2014 did involve the making of an error of law and accordingly the decision upon the appeal is set aside. The appeal is remitted to the First Tier Tribunal with the following directions;
 - i) The decision upon the appeal is set aside and the appeal is remitted to the First Tier Tribunal. The appeal is not to be listed before Judge SJ Clarke.

The appeal is to be listed at Taylor House on the first available date allowing 3 hours with a Dari interpreter booked for that hearing.

- ii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Deputy Judge of the Upper Tribunal JM Holmes

Dated 26 January 2015