



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

Appeal Number: IA/33944/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Decision and Reason Promulgated
Centre
On 5 January 2016 On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

**YAQ
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Garrod, instructed by Justice and Law Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Preliminary

The appellant has requested and I consider it appropriate to make an order in the Upper Tribunal under Procedural Rule 14(1) to prohibit the disclosure or publication of any matter likely to lead members of the public to identify the appellant. To give effect to this order the appellant is to be referred to by the initials above.

1. The appellant challenges the decision and reasons statement of First-tier Tribunal Judge Birk that was promulgated on 6 July 2015. Having heard from both representatives and having considered the grounds of application, the rule 24 response and other documents on the appeal file, I am aware that the outcome of this appeal will depend in large part as to whether Judge Birk had proper regard to the cross-government definition of domestic violence and abuse.
2. The definition has not been static. An earlier version was discussed in Ishtiaq v SSHD [2007] EWCA Civ 386, although that did not apply across all government departments and was applicable to immigration matters. It was further considered by the Administrative Court in R (Balakoochi) v SSHD [2012] EWHC 1439 (Admin).
3. The cross-government definition itself was introduced on 26 March 2013 and was last updated on 27 March 2015. Its current version is the same as when Judge Birk heard the appeal and provides:¹

Domestic violence and abuse: new definition

The cross-government definition of domestic violence and abuse is:

any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to:

- psychological
- physical
- sexual
- financial
- emotional

Controlling behaviour

Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour

Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

This is not a legal definition.

¹ Taken from <https://www.gov.uk/guidance/domestic-violence-and-abuse>. The same definition can be found at page 10 of the Home Office guidance Victims of domestic violence – version 13.0 (Published for Home Office staff on 29 May 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/489203/Victims_of_domestic_violence_v13_0_EXT_clean.pdf

4. Although this definition is not a legal definition, since it is part of Home Office policy it is relevant to the consideration of whether a person benefits from paragraph 289A of the immigration rules and to that extent is material to assessing whether Judge Birk's approach to the appellant's evidence of domestic violence in relation to the application of the immigration rules is legally flawed.
5. Having set out the context of this appeal, I turn to the submissions of Mr Garrod and Mr Mills.
6. Mr Garrod provided a detailed skeleton argument which records his submissions. His amplification sought to persuade me that Judge Birk had failed to give adequate reasons for her findings and decisions, primarily because she had not given sufficient detail to show that she had full regard to the appellant's documentary and oral evidence. In this context, Mr Garrod drew my attention to the evidence from Women's Aid, the appellant's GP and communications between the appellant and her relatives that revealed the history of domestic abuse as claimed and argued that the evidence was not adequately addressed by Judge Birk.
7. Mr Garrod also submitted that Judge Birk had misdirected herself in the inferences she drew from the evidence relating to financial support from the appellant's sister and the apparent apology from the appellant's husband because she appeared to be looking for evidence against the appellant rather than evaluating the evidence in the round. Mr Garrod suggested that such misdirection was the result of Judge Birk not setting out the definition of domestic violence and abuse and that there was no guidance as to how its terms should be applied. I mention at this juncture that Mr Garrod admitted to being unable to obtain the current definition and he relied on the definition set out in Ishtiaq.
8. Mr Mills argued the converse to both grounds. He reminded me that much of the evidence post dated the reasons for refusal letter and that undermined the weight it could be given. There was no explanation why the appellant first reported domestic abuse to her GP and to Women's Aid in September 2014 and not earlier. Mr Mills pointed out that the medical notes went back to 2011. The communication between family members was weak evidence and the alleged apology from the appellant's husband was equivocal. As such, it was open to Judge Birk to find that the evidence did not show the appellant was a victim of domestic abuse. Mr Mills argued that the grounds of appeal were mere disagreement with legitimate judicial findings.
9. Both representatives indicated that there is difficulty in appeals such as this since there is no objective threshold or test which identifies when there has been domestic violence or abuse. It is for the Tribunal to decide for itself what evidence is acceptable and although the burden of proof lies on the appellant to show what is more likely than not to have happened, leeway has to be given because of the difficulty of obtaining corroborating evidence.

10. My findings and conclusions are as follow.
11. Both representatives are not correct in saying that there is no guidance about how the terms set out in the definition of domestic violence and abuse are to be understood. As I have set out, the definition contains explanations of controlling and coercive behaviour. Threatening behaviour and violence are not explained in the definition but there is no need to provide an explanation since they are more obvious. In any event, in the appeal before Judge Birk the appellant was not alleging that she had been the victim of threatening behaviour or violence but that she had suffered psychological, financial and emotional abuse, as is clear from her original application and later witness statement.
12. I am satisfied that Judge Birk understood the nature of the appellant's claim because of her observations in paragraphs 6, 7, 11 and 16. The judge's examination of the claim at paragraphs 12 to 15 confirm that she was aware of the claim and the evidence relied upon by the appellant.
13. I am also satisfied from these paragraphs that Judge Birk was aware of the context of the appeal and examined the appeal in terms of the definition of domestic violence and abuse. I reach this conclusion because in paragraph 11 Judge Birk refers directly to the five listed examples of abuse set out in the definition. Mr Garrod's complaint that it was not clear what Judge Birk was doing is unfounded because what is clear from his submissions is that he – unlike Judge Birk – was not aware of the cross-government definition. There was no need for Judge Birk to set out the definition in full because it was reasonable for her to assume that both parties would be aware of the definition. It is enough, therefore, that she shows that she applied the relevant definition.
14. From the findings Judge Birk made in paragraphs 12 to 16 I am also satisfied that Judge Birk had in mind the explanations of controlling and coercive behaviour in the definition. The appellant claimed that she was abandoned by her husband and that was accepted by Judge Birk. But, as Judge Birk found, that does not establish a history of domestic violence or abuse. The appellant's husband did not isolate the appellant or deprive her from the means to be independent as is evident from the fact the appellant was able to contact her sister and to receive financial support from her.
15. Judge Birk was aware of the appellant's mental health issues but it was open to her to find that these were not caused by her husband because there were other significant factors as she explained in paragraphs 14 and 15. Judge Birk concluded that the appellant's evidence showed an acrimonious marital breakdown and nothing more.
16. Judge Birk was aware of the letter of support from Women's Aid but when looking at the other evidence, particularly the medical records, she was unable to give it significant weight. On this point I accept Judge Birk could have been clearer, but as Mr Mills submitted, the point was obvious

particularly as the appellant did not report any issues of abuse to Women's Aid until after her application for indefinite leave to remain was refused. The information contained in the letter was merely that provided by the appellant and did not sit well with the detailed medical records which were silent on the issue of abuse until after the date of refusal.

17. In light of these considerations, I find that there is no material legal error in Judge Birk's decision and therefore it is upheld.

Decision

The decision and reasons statement of Judge Birk does not contain legal error and is upheld.

Signed

Date

Judge McCarthy
Deputy Judge of the Upper Tribunal