



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

Appeal Number: PA/02940/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 14 July 2016**

**Decision Promulgated
On 27 July 2016**

Before

UPPER TRIBUNAL JUDGE GILL

Between

**MB
(ANONYMITY ORDER MADE)**

Appellant

And

The Secretary of State for the Home Department

Respondent

ANONYMITY ORDER

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant.

This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr T Gaisford, of Counsel, instructed by Wilson Solicitors LLP.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Mexico, born on 5 June 1974. She appeals against a decision of Judge of the First-tier Tribunal Herlihy who, following a hearing on 10 March 2016, dismissed her appeal under s.82 of the Nationality, Immigration and Asylum Act 2002 on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 16 November 2015 to refuse her asylum, humanitarian protection and human rights claims.
2. At the outset, I stress that this is a case with a lot of evidence and a very detailed account. The summary I give below is very brief one but sufficient for the purposes of this decision, as I have decided to remit this case to the First-tier Tribunal for the decision on the appellant's appeal to be re-made.

3. The basis of the appellant's protection claim may be summarised as follows: Whilst in Mexico, the appellant was in a relationship with a man who I shall refer to as "SM" (he is anonymised because I take the view that the use of his full name may reveal the identity of the appellant) from 1993. He was physically and sexually abusive towards her. She reported the incidents to the police between 5 and 7 times up to 2013 but the police did not take her complaints seriously. From 2013, she stopped reporting incidents to the police as she suspected SM had become involved with a drug cartel called Los Zetos ("LZ"). He started to have a lot of money. She believed that he was in the LZ gang because the gang members referred to each other in code, using the letter Z and a number attached to it. They also wore paraphernalia like rings and Z-shaped pendants. She says that, as far as she was concerned, her relationship with SM ended in 2007. However, although she tried to live and hide away from him, her attempts to leave him were unsuccessful, in that, he found her. She relocated away from her home area on two occasions but SM found her and beat her. In the periods when she managed to stay away from him, she formed other relationships, someone named H and someone else named R. However, SM tracked her down on both occasions. He threatened R and his family, so he stopped seeing her. She believes that SM was able to find her because of his connections with the gang. She fears that, if returned to Mexico, she will be persecuted by SM and also LZ. The gang had also threatened her on one occasion.
4. The judge accepted that the appellant had had a relationship with SM. She found that the relationship ended in 2007/2008 (para 49). She did not accept that SM was a member of LZ. At para 45, she said:
 45. ...I find it very likely that [SM] may have been involved with the illegal narcotics trade given the widespread prevalence of the drug trade in Mexico and the background material that indicates more people in Mexico work for drug cartels than any other business or industry in Mexico. However given the background relating to LZ, their reputation for extreme violence; particularly towards women I did not find it credible that the appellant would have been able to continue to live in [the appellant's hometown] after her relationship with SM finished in 2007/2008 if he had made threats against her which it is claimed he did.
5. The judge considered the appellant's evidence further at paras 46-53. She found, inter alia, that there was no evidence that SM or LZ have any interest in locating the appellant after a passage of 4 years since she left Mexico and 7-8 years after her relationship with SM ended.
6. I am satisfied that the judge erred in law in reaching her finding that SM was not a member of LZ. The judge accepted that SM was involved with an illegal narcotics trade but rejected the appellant's claim that SM was a member of LZ. In rejecting the appellant's evidence that SM was a member of LZ, the judge failed to take into account the following evidence:
 - i) The appellant's evidence that SM and the members of his gang referred to each other in code, using the letter Z and a number attached to it and that they wore paraphernalia like rings and Z-shaped pendants.
 - ii) The supporting evidence of the expert in this regard, that the wearing of gang jewellery by non-members would pose a very real risk to the non-member wearing the jewellery.
7. I have noted para 29 of the judge's decision's where, in summarising the appellant's evidence, she said that the appellant had said that she knew that the gang members were members of LZ because they wore caps and earrings and weapons with "Zetos" on it and that they often spoke "*in codes*" when they spoke to each other. Mr Gaisford submitted that the judge had mischaracterised the appellant's evidence at para 29 in saying that the appellant had said that the gang "*often spoke in codes*", whereas her evidence was that they referred to each other in code.
8. I do not need to make a decision on this submission for the following reasons. The judge found that SM was involved in the "*illegal narcotics trade*" but did not make it clear whether

she found he was acting on his own or part of a gang. If the former, she did not say why. If the latter, she failed to take into account the evidence described at para 6(i) and (ii) above which was material to the identification of the gang to which SM belonged. Given the importance of this evidence to the identification of the gang and thus the future risk on return, it cannot be assumed from the summary of the evidence at para 29 (even if accurate) that the judge had had it in mind and considered it in reaching her finding at para 45. It was incumbent upon the judge to engage with that evidence before rejecting the appellant's claim that SM was a member of LZ.

9. Mr Tufan accepted that the judge had erred by overlooking the evidence set out at para 6(i) and (ii) above but submitted that the error was not material to the judge's rejection of the appellant's evidence that SM was a member of LZ because the judge said in the final sentence of para 45 of her decision that she found it not credible that the appellant would have been able to continue to live in her hometown after her relationship with SM ended in 2007/2008 if he had made threats against her as claimed by the appellant. However, I reject Mr Tufan's submission: Firstly, in reaching the finding in the final sentence of para 45, the judge failed to take into account the appellant's evidence that she had tried to relocate outside of her hometown on two occasions and that she was found. Secondly, the judge's assumption that the appellant would not have been able to continue living in her hometown if SM had made threats against her proceeded on the assumption that it was SM's purpose to end the appellant's life if she did not remain with him whereas the appellant's evidence was that it was his purpose to keep her in a relationship with him expecting her to continue to put with abuse and violence.
10. I am therefore satisfied that the judge erred in law in reaching her finding that SM was not a member of LZ and that the error was material to the finding that SM was not a member of LZ.
11. The next question is whether the fact that the judge assessed the risk to the appellant from LZ means that the above error is not material to the outcome of the appeal, albeit that it was material to the judge's finding that SM was not a member of LZ.
12. It is clear from the evidence of Dr Watt that drug cartels such as LZ use methods to instil fear into people who become involved with them or are perceived by them to have become involved, in order to keep cartel members loyal to the group and their female partners in the relationships. That is why Dr Watt's opinion is that once you are involved with a group like LZ, it is for life and you cannot leave. Accordingly, the judge's view (expressed at para 52) that the risk from LZ arises only if the appellant had knowledge or participated in activities that were opposed to the interests of LZ was not only a simplistic view of the situation but it ignored the evidence of Dr. Watt's evidence that the risk arises from the fact that the attitude of gang members is that a woman is not permitted to leave once she is associated with the group by having a relationship with one of its number. It must follow that this applies if the woman is *perceived* by LZ to be associated with it, which is the appellant's case.
13. At para 49, the judge said:
 49. The Appellant says she did not interact with the cartel members and appears to have avoided any social interaction. She only recounts one instance where she claims she was threatened by gang members whilst waiting in a car which, at the highest amounts to being told she should not be there she was and that she did not see anything. There is no evidence that the Appellant had any involvement with the gang's activities or knew anything about their business or why they would perceive that she does given that she had no interaction with them. I find that her relationship with Salvador ended in 2007/2008 and that although an abusive relationship I do not find it credible that the relationship continued beyond this point or that Salvador had any interest in the Appellant after the relationship ceased.

(my emphasis)

14. The question whether the appellant had had social interaction with gang members is important to the question whether the appellant was perceived by the gang members to be involved with them through her relationship with SM notwithstanding that she herself was not involved in any gang activities.
15. There are two difficulties with the part of para 49 that is not underlined in the quote above. Firstly, this does not properly reflect the appellant's evidence. For example, it is clear from paras 41 and 41 of her witness statement (p20) and question 12 of her asylum interview, that the appellant's evidence was that she was present with SM in restaurants and bars when members of the gang came and that she was known to be SM's partner. It is clear that her evidence was that she could not avoid some such interaction but she did not go out of her way to interact with them. I am therefore satisfied that the judge mischaracterised the appellant's evidence.
16. It is clear that the judge's view that there was no evidence that LZ would perceive that the appellant was involved with them or knew anything about their activities given that she had had no interaction with them was a reason for her finding that there was no real risk in the future. However, as I have said above, the judge mischaracterised the appellant's evidence in this respect. Furthermore, in arriving at her conclusion as to the future risk on this basis, the judge failed to take account of the evidence of Dr Watt that a woman who is the partner (or perceived partner) of a gang member is expected to stay loyal.
17. I have noted that the judge referred to and assessed the evidence of Dr Watts at paras 50 and 51, which read:
 50. I have carefully examined the two reports from the expert witness which are predicated on his belief that the Appellant's claim is credible. Although I have not found that the Appellant has established to the lower standard of proof that Salvador was a member of LZ, I have nevertheless considered the reasons given by DR Watt for finding the Appellant is at risk on return to Mexico. When I asked about the latest report at paragraph 43 dealing with internal relocation and how the Appellant has undermined the authority of the LZ, he said if you are involved with a group like LZ involvement is for life and you cannot leave and no operative can leave and you would be expected to continue with them for life and it would apply equally to a girlfriend who is expected to stay loyal. He said that women were particularly at risk given the way women are perceived as a group by LZ, they would be viewed as commodities and that the Appellant's actions would be viewed by male members as an affront to their machismo and would be threatening and not tolerated. Dr Watt said it was expected that if you were involved with a cartel member you were his possession and you could not just leave.
 51. However I have not found that the Appellant and Salvador were in a relationship when she left Mexico for the reasons given and I do not find that her actions for this reason would be viewed as an affront or to be threatening. I put it to Dr Watt that if Salvador was interested in the Appellant he is likely to have contacted her family members. He said the possible main concern would be not to go to the police as they are ineffectual and if the Appellant was returned to Mexico it is possible that the LZ might consider that she could give information to a rival organisation or she could be captured by a rival organisation but whilst she was abroad she was not seen as a threat to them. However by the Appellant's own evidence she did not interact or have any dealing with Salvador's gang or cartel and I do not find it credible that she would be perceived as having any information that she could provide to a rival gang.
18. Whilst para 50 shows that the judge was aware of the evidence of Dr Watt that a woman who is a partner of a gang member is expected to stay loyal and that women are particularly at risk, the first sentence of para 51 shows that the judge in effect disregarded that evidence on

the basis of her finding that the appellant and SM were not in a relationship when she left Mexico and her finding that her actions would not be viewed as an affront or to be threatening. I am satisfied that both of these findings do not in fact take account of the expert's evidence, notwithstanding that the expert's evidence is summarised at para 50, that a girlfriend is expected to remain loyal to her partner and that the appellant's action in attempting to leave SM would be seen as an affront to the machismo of the men in the gang and would not be tolerated.

19. Accordingly, the judge materially erred in law in her assessment of the risk to the appellant from LZ. It follows that the errors in reaching her finding that SM was not a member of LZ were material.
20. Mr Tufan accepted that any errors in the assessment of credibility would feed into the assessment of the Article 8 claim, since this would mean that the appellant's circumstances will not have been assessed against the correct factual matrix.
21. Accordingly, pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007, read together with the above Practice Statement, I find that Judge Herlihy materially erred in law. I set aside her decision and remit the case to the FtT with the direction that it is not to be dealt with by Judge Herlihy.
22. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
23. Having regard to para 7 of the Practice Statement and the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that in this case Practice Statement 7(2)(a) applies.
24. Paras 27, 28 and 30 to 39 of the determination of Judge Herlihy stand as a record of the oral evidence given at the hearing before the judge. Para 29 is omitted because the appellant takes issue with the accuracy of the summary of this aspect of the appellant's evidence.
25. If the appellant contends that there is an applicable Geneva Convention reason, she is directed to serve her skeleton argument which, inter alia, must explain what Geneva Convention reason applies and why, no later than 10 working days before the hearing date.

Decision and Directions:

The decision of the Judge of the First-tier Tribunal Herlihy involved the making of an error of law such that it falls to be set aside. I have set it aside. I direct that the appellant's appeal be remitted to the First-tier Tribunal for the decision on the appeal to be re-made by a judge other than Judge Herlihy.

Signed



Date: 25 July 2016

Upper Tribunal Judge Gill