



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04015/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd August 2018

Decision & Reasons Promulgated
On 21st August 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA

Claimant/Respondent

Representation:

For the Claimant: Mrs H Aboni, Home Office Presenting Officer

For the Respondent: Mr Wells, legal representative of M & K Solicitors

DECISION AND REASONS

1. The claimant is a citizen of Pakistan seeking to appeal on the basis of human rights against the refusal of the respondent of 26th January 2016 to grant her leave to remain.
2. The claimant entered the United Kingdom as a visitor in 2010. She claimed asylum on 4th May 2011, which was refused by the respondent on 30th April 2012. She did not appeal against that decision but was granted discretionary leave until 30th April 2015 as she was a minor. The claimant lodged an application for further leave to remain on 28th April 2015 which was refused in the decision currently under challenge.

3. The claimant sought to appeal against that decision which appeal came before First-tier Tribunal Judge Birk on 15th December 2017. In a determination on 1st February 2018 the appeal was allowed in respect of human rights.
4. The respondent seeks to challenge that decision raising a number of evidential and legal matters. Permission was granted to the Upper Tribunal. Thus the matter comes before me.
5. The first matter of fundamental concern in this case is the nature of the claim which she seeks to put forward.
6. The original asylum claim, which was the subject of the refusal of 30th April 2012, indicated that the claimant was frightened to return by reason of her paternal uncles. Seemingly her mother had had an affair as a result of which the claimant, her brother and mother had been beaten.
7. It was noted that her evidence on that matter was somewhat inconsistent. It was not accepted that the mother had had the affair that was claimed or indeed that the account which she had given was credible. It is not accepted therefore that there was any risk to her upon return. As was indicated no appeal was lodged against that decision because the claimant was granted discretionary leave to remain.
8. On 28th April 2015 the claimant made her human rights application for leave to remain.
9. Significantly in that decision it was noted that the claimant had raised no protection based submissions within her current application. It was considered that her previous protection claim had fully been considered in the decision of 30th April 2012. She had not appealed against that nor did she seek in the submissions before the Secretary of State to resurrect her claim. Essentially the matter was considered upon the basis of her family connections in the United Kingdom and whether it was reasonable for her to return.
10. In the course of preparation for the hearing it became clear that the claimant was seeking to rely upon her fear of her uncles, not only for the reasons which had previously been set out in the asylum claim, but also because of the significant and substantial sexual abuse which she claimed to have experienced at the hands of her uncles. That concern was raised by the claimant to her legal advisors with the result that on 23rd March 2017 she was examined by Dr Robin Lawrence and a psychiatric report prepared on 28th March 2017. It is a detailed report and is set out in the hearing bundle. It records admission to the emergency department on 25th November 2016 seemingly by a paracetamol overdose and a history of depression and suicidal tendencies. It was recorded in the medical records that she felt emotional due to childhood abuse. An account is taken and set out in the report as to the behaviour and sexual assaults upon her by her uncles. A diagnosis of depression and post traumatic stress disorder is made in that report. It is the view of the author of the report that she

had suffered from that condition since she had arrived and highlighted her vulnerability and her need for family support. Precise details of the abuse is set out in her detailed statement, part of the bundle prepared on 2nd August 2017.

11. It was to be noted that this was a matter that had not been mentioned at all in the original asylum nor indeed had it been mentioned in support of her application to remain in the United Kingdom under human rights.
12. It was the view of the Secretary of State that such constituted a new matter for the purposes of Section 85(5) of the Nationality, Immigration and Asylum Act 2002 and as such required consent of the Secretary of State before the Tribunal could consider that matter. The Secretary of State had not previously had the opportunity of considering the matter in either decision that had been made.
13. The matter came before First-tier Tribunal Judge Ford on 11th April 2017 listed for directions hearing.
14. The complaint made by the Presenting Officer at that hearing was that in effect the claimant was seeking to resurrect her previous protection claim and putting in a new one under the guise of a human rights claim.
15. The Presenting officer specifically objected to the issues relating to the claimant's claimed fear of uncles being raised within the appeal. It regarded that as a new matter and indicated there was no consent to deal with those allegations. It was said in terms "at the present time the Secretary of State does not consent to the "new matters" of the claimed fear of physical abuse or sexual abuse being dealt with in this appeal.
16. Such a comment was made in the light of an application made by those acting on behalf of the claimant of 4th April 2017 as follows "we would like permission from the Tribunal to be allowed to vary our grounds of appeal in this matter to allow our client to reargue her asylum claim which was refused on 30th April 2012". That application was refused by the Judge of the First-tier Tribunal. The Judge also added as follows:- "this should be borne in mind when instructing the psychiatric expert and the independent social worker. Unless and until the Secretary of State gives her consent to sexual abuse issues being dealt with in this appeal against the refusal of the claimant's human rights claim, the Tribunal is prevented by statute (Section 85(4) to (6) of the NIA 2002 (as amended)) from dealing with these issues"
17. Mr Wells indicated to me that at that particular hearing he had requested the respondent to consider the matter that had been raised but that had been declined on the basis that a formal application to do so needed to be made. Mr Wells considered that that was an unreasonable response and no formal application was submitted. It is his view that all relevant material had been placed before the Secretary of State, the Secretary of State should have considered it.

18. In a letter of 27th September 2017 to the Tribunal it was indicated on behalf of the claimant by the solicitors acting for her, that they were mindful of that direction, but that the protection based material was being raised as part of the arguments in relation to paragraph 276ADE of the Immigration Rules in relation to private life, that there would be “significant obstacles” to a reintegration into Pakistan. It was emphasised that the issues were raised solely in connection with Article 8 of the ECHR.
19. A letter was written to the Home Office by the solicitors dated 12th December 2017 indicating that the hearing was to be on 15th December 2017 and enclosing the bundle of documents drawing attention particularly to the various reports. The solicitors made the same point that the protection material was solely focused upon the aspect of human rights.
20. At the hearing conducted on 15th December 2017 the claimant repeated her concerns as to her uncles and her fear of returning, such is set in the context of having no family to return to and no family support were she to be returned to Pakistan. Considerable reliance was placed on the case of Kugathas and the dependency that she has upon her family, in particular upon her brother in the UK. Indeed there was a psychiatric report on him and of his own vulnerability. It is said therefore that there was a dependency over and above normal dependency.
21. Reliance was also placed upon the psychiatric report of Mr Lawrence, indicating her mental vulnerability, particularly the absence of any support and her likelihood of harm and of the likelihood that there would be no adequate support for her mental condition. Such was not based particularly on the absence of institutions to lend support but rather on the fact that her family support in the United Kingdom was fundamental to her mental health.
22. The respondent in the grounds of appeal contend that in reality the risk on return featured significantly in the determination and served to influence in effect a large part of the Judge’s findings in relation to private and family life considerations. It is argued that that was presented unlawfully and in defiance of the directions that had been made.
23. In one sense of course the sexual assault by the uncles perhaps adds very little to the issue of protection as the risk from the uncles was considered already in the early asylum decision, but is quite clearly of importance in the psychiatric assessments that have been made. As Mr Wells most fairly conceded it is an amalgam to some extent between a protection claim and a human rights claim, although he was concerned to emphasise that it was the very significant obstacles of return that featured, rather than any risk of return It is perhaps difficult in common sense to separate the two.
24. Perhaps a council of perfection would have been for the claimant’s solicitors to have made an application for a fresh claim whether in respect of the asylum decision or in respect of the human rights decision. That would have afforded the respondent the opportunity of considering matters that were not previously raised.

25. Whether or not of course her formal application was made does not necessarily prevent the respondent from considering the material, particularly in the preparation for the hearing. It is clear, as I so find, that by September 2017 the respondent was well aware of the nature of the evidence that was being presented in support of the case. Certainly at the beginning of the hearing it would have been apparent to the Presenting Officer the general nature of the evidence that was being relied upon, particularly that of the psychiatric report of Dr Lawrence of 28th March 2017 and the report from Fiona Wallace of 8th August 2017.
26. No formal procedural challenge was presented by the Presenting Officer to the Judge as to new material and the absence of consent. Although silence does not necessarily imply consent it would have been open to the respondent to have raised the challenge to the hearing proceeding on the basis as disclosed, as was made in the directions hearing earlier in the year. It cannot be said that the respondent was taken by surprise by new material at the hearing when it had been disclosed in considerable volume in September.
27. It may be that other matters were served later than that but no objection was taken at the hearing to it.
28. The claimant gave her evidence and was cross-examined about it. Her brother also gave his evidence and was cross-examined as was her sister-in-law. Thus the respondent through the Presenting Officer fully engaged with the process.
29. The respondent's case is set out at paragraphs 12 and 13 of the determination. It said that there were no emotional ties to her brother and no significant obstacles to living in Pakistan.
30. In all the circumstances I do not find therefore that the Secretary of State had continued to refuse consent to those new matters being considered at the hearing. In those circumstances I do not uphold the challenge that is now made to the decision.
31. The Judge had the opportunity of evaluating the nature of the evidence as given by the witnesses and by the claimant and one should be slow without reason to discount the findings of credibility that were made. There was a very powerful report by Dr Lawrence as to her mental state and to her vulnerability. Indeed there was a report also in the bundle as to the problems experienced by her brother and his vulnerability. Both reports supporting the contention that there was more than family dependency in this case and that to deprive the claimant of it, by removing her from the jurisdiction would adversely affect her wellbeing, particularly in the absence of any evidence of family support. Challenge is made that consideration was not given to the possibility of the brother giving financial support to her from the United Kingdom but that was perhaps to misunderstand the nature of the evidence that was given by the brother, namely that he would feel compelled to go with her in order to maintain that family link. It was the emphasis on Kugathas and the lack of any other tangible support in

Pakistan which led to the argument that there were exceptional circumstances outside the Rules and indeed very significant obstacles to her integration.

32. Looking at the matter overall I find that it was properly open to the Judge to come to those conclusions. The case veered towards human rights, rather than to specifically protection issues, although they could not be altogether excluded particularly when considering the absence of any other support that might be available.
33. In all the circumstances I find that the conclusions of the Judge were properly open to be made and not tainted by any illegality or irrationality.
34. In those circumstances the respondent's appeal before the Upper Tribunal is dismissed. The First-tier Tribunal decision shall stand, namely that the claimant's appeal succeeds solely on the basis of Article 8 of the ECHR.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Date 10 August 2018

Upper Tribunal Judge King TD