



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03874/2019
(V)**

THE IMMIGRATION ACTS

**Heard at Bradford by Skype for Decision & Reasons Promulgated
business
On the 6 November 2020 On 10 November 2020**

Before

UPPER TRIBUNAL JUDGE REEDS

**Between
AS**

(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Berry, Counsel instructed on behalf of the appellant

For the Respondent: Mr M. Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a national of Jordan, appeals with permission against the decision of the First-tier Tribunal Judge Thapar (hereinafter referred to as the "FtTJ") who dismissed his human rights claim in a decision promulgated on the 5 September 2019.
2. The First-tier Tribunal made an anonymity order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. The parties made no submissions in relation to this order and

therefore for the purposes of this hearing I continue that order (pursuant to 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. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The background of the appeal is set out in the decision of the FtTJ and the papers.
4. The appellant is a citizen of Jordan. He arrived in the United Kingdom on 19 January 2014 as a student. He was married to his former wife, A, on 11 November 2014. On 23 June 2015, the appellant made an application for leave to remain on the basis of his marriage. The application was successful, and leave was granted until 23 December 2017.
5. His relationship with his wife broke down in January 2018 and they separated on 20 January 2018. On 8 March 2018 he was issued with a grant of leave to remain under D-LTRP1.1 for a period of 30 months valid until 10 September 2020. The appellant applied for indefinite leave to remain on 23 April 2018 as a victim of domestic violence. The application was refused in a decision letter of the 8 February 2019.
6. The decision letter considered the requirements of Appendix FM in the light of the modernised guidance in relation to domestic violence. The decision letter acknowledged the evidence that had been provided in support of his claim however having considered that evidence the respondent reached the conclusion that he failed to provide sufficient demonstrative evidence that he was a genuine victim of domestic violence as claimed. Therefore, he failed to satisfy the requirements under the rules to demonstrate that his relationship with his former spouse scores to permanently break down as a result of domestic violence.
7. The appellant appealed that decision which came before the FtTJ on 30 July 2019. In a decision promulgated on 5 September 2019 the FtTJ dismissed his appeal on human rights grounds. The FtTJ heard evidence from the appellant, his solicitor and two friends. The judge also had before him a large bundle of documentation including medical reports from Dr A and Dr C. The FtTJ set out his reasons for reaching the conclusion that the witness evidence was not consistent (at paragraphs 23 - 24) and was not satisfied that the appellant had been injured by his former wife. He placed little weight, if any, on the medical evidence and whilst he found that the appellant had suffered emotionally following the breakdown of his marriage, he made a finding that he did not accept the marriage itself was caused to break down due to domestic violence (at[19] and [26]). The judge took into account his private life having lived in the UK for five years but considered that he had remaining family in Jordan and worked there

prior to his arrival in 2014. The judge found that there were no very significant obstacles to his integration to Jordan and in relation to the medical evidence there was no reason why he could not receive treatment for his condition in his country of origin. He also considered that his friendships with those in the UK could continue upon return. Whilst a return to Jordan would impact upon his business which had established in the UK, the judge did not find that his removal would lead to an “irreplaceable loss to the UK”. Thus, he found that the decision of the respondent was a proportionate one.

8. The appellant sought permission to appeal that decision and permission was granted on 9 January 2020 by FtTJ Keane.
9. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.
10. The hearing took place on 6 November 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video as did the appellant and his solicitors. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
11. Mr Berry, Counsel on behalf of the appellant, relied upon the written grounds of appeal and his skeleton argument.
12. No Rule 24 response was filed on behalf of the respondent.
13. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.
14. Mr Berry began his submissions by relying on the written grounds and his skeleton argument. I asked him to begin with grounds 2 -4 which dealt with the substantive challenge to the FtTJ’s decision. At the conclusion of his oral submissions Mr Diwnycz addressed the Tribunal and conceded that the decision of the FtTJ involved the making of an error on a point of law and that as a result it should be set aside.
15. Therefore the parties are in agreement that the decision of the FtTJ cannot stand as a result of the errors of law that are set out in the appellant’s grounds of challenge and that given the errors relate to the assessment of the evidence including the credibility of the factual

issues, both parties are also in agreement that the appeal should be remitted to the FtT.

16. In those circumstances, it is not necessary for me to give great detail as to why the decision should be set aside. However, I shall set out in brief terms why I am in agreement with the position of the parties before the Tribunal.
17. Dealing with ground 2, the submissions advanced on behalf of the appellant make reference to the FtTJ's assessment of the issue of domestic abuse. This was a central part of the appellant's claim as set out in the decision letter of the respondent, and it was not accepted that the appellant had provided evidence which demonstrated that the relationship with his former spouse was caused to permanently break down as a result of domestic violence. The respondent acknowledged that the appellant may well have experienced marital difficulties during the breakdown of the relationship but stated at page 5 of the decision letter, that whilst many might suffer from ongoing medical/psychological issues arising from the marital difficulties and/or divorce, that is not the same as someone suffering from domestic abuse. There is a reference within the decision letter to the evidence relied upon by the appellant.
18. The point made by Mr Berry is that whilst the FtTJ addressed some of the alleged incidents that related to physical harm, there was no assessment of the non-physical domestic abuse that formed part of the factual matrix. In his submissions, Mr Berry directed the Tribunal to the supporting evidence which was set out in the appellant's witness statement. The factual account given by the appellant as set out by the references in the grounds did not only relate to physical abuse but also considered what has become known now as "coercive and controlling behaviour."
19. In the appellant's bundle there was a copy of the respondent's policy "Victims of domestic violence and abuse" version 14.0 published on 5/2 2018 (exhibited at A317 - A323). Within the policy the definition of domestic violence and abuse is given at A322 which includes "any incident or pattern of incidents of controlling, coercive or 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. This can include, but it is not limited to, the following types of abuse: psychological, physical, sexual, financial and emotional. The policy goes on to refer to "other forms of abuse which includes controlling behaviour which is defined as "a range of acts designed to make a person subordinate 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 is also defined as follows "an actual pattern of acts of assaults, threats, humiliation and intimidation and other abuse that is used to harm, punish or frighten the victim."

Importantly, the policy recognises that no distinction shall be made between psychological abuse and physical abuse when assessing if a person has been the victim of domestic violence or abuse.

20. As Mr Berry submits and Mr Diwnycz accepts, there was no consideration in the overall factual findings upon the other issues of coercive and controlling behaviour which had formed part of the factual matrix. It would have been open to the judge to have rejected that evidence provided he gave reasons referable to the evidence but as the parties accept to not consider that evidence was a material error.
21. Ground 3 relates to the evidence that emanated from the criminal proceedings that had taken place in the Crown Court where the appellant was the defendant, and his former wife was the complainant. It is not necessary to set out the history of those criminal proceedings but it is sufficient to state that before the FtTJ, and most unusually, the solicitor who was dealing with the criminal proceedings had given a witness statement (see A 454) which set out the events at the rehearing of the criminal trial which appears to have been conducted as an appeal against the conviction from the district judge. The solicitor also gave oral evidence. At paragraph 16 of that witness statement and also in a further email which is found in the bundle, the solicitor set out the court's ruling. In particular, at paragraph 16 (at A456), it is recorded that the court had reached the conclusion after hearing the evidence that the complainant was "not a witness who can be wholly relied upon". Conversely the same paragraph refers to the appellant's evidence which was described as "unshaken, entirely credible, supported by emails and texts supported by his witness... We found him a convincing witness of fact."
22. Mr Berry submitted that the FtTJ did not engage with that evidence from the criminal proceedings and that what can be seen from the witness statement of the solicitor was that the appellant and his wife were not in the same position as regards their evidence. Thus, he submits the analysis of that evidence at [13] of the FtTJ's decision was inadequate as a summary of the evidence in the criminal proceedings when such differing conclusions as to the credibility of each of the parties had been reached.
23. Again, when looking at the decision of the FtTJ at [13] there is no reference to the substance of that hearing. Whilst I would accept, as did Mr Berry that the judge noted that he was mindful that the appeal focused on whether an offence was committed by the appellant and was not concerned with determining whether the appellant's marriage broke down due to domestic violence, the credibility of each of the parties as set out in that judgement was a material consideration in the question of the credibility of the appellant in these proceedings. The only reference to that evidence at [13] was a submission made in the criminal proceedings that "no doubt both of

them are childish, but we are far away from criminal conduct” (AB27). As the parties accept, that did not address the differing outcomes of credibility as found by the criminal court. Thus, a material part of that evidence was not placed in the balance when reaching an overall conclusion on the issue.

24. The remaining grounds relate to the medical evidence and in particular the reports of Dr A and Dr C (the treating GP). In relation to the report of Dr A, who was a psychiatrist, the assessment of his evidence by the FtTJ is set out at [15 - 17] of the decision. It is plain from reading this paragraph that the FtTJ was critical of the contents of the report (at [16]). However, as Mr Berry submitted there was no evidential basis for the criticism made that the judge who stated that “I would have thought that even if therapeutic work commenced after the grant of indefinite leave the appellant would be in touch with painful past experiences”. The FtTJ did not have any basis for substituting his clinical judgement for that of the expert and it is unclear what submissions were made on behalf of the respondent. Even if the FtTJ was entitled to reach that view, there was no assessment of the suicide risk which had been referred to in the medical report, which again had to be viewed in the round and in the context of the appellant’s factual claim.
25. As to the evidence given by Dr C that was contained in two pieces of evidence firstly a letter dated 14/6/2019 (AB 146) and a later letter dated 27/7/2019. The FtTJ at [20] reached the conclusion that the contents of those letters were inconsistent with each other and thus he attached little weight to the contents. However, that assessment did not take into account the basis upon which each of those separate letters was made. The second letter was one that added detail to the first letter and thus was not inconsistent with the first letter.
26. As a result, the FtTJ did not place any weight on the medical evidence when reaching his overall assessment and Mr Diwnycz accepts that without considering that evidence in context, that was a material error.
27. In relation to Ground 1, Mr Berry submitted that the Tribunal failed to direct itself lawfully and apply Article 8 ECHR in a lawful manner and as regards the structured approach to an Article 8 ECHR assessment that ought to have been followed, in *Hesham Ali (Iraq) v Secretary of State* [2016] UKSC 60 and made no reference to the S117 public interest considerations. Even if that submission was not the strongest ground, it being a submissions based on form rather than substance, in the light of the errors set out above, it is accepted by the parties that it led to an erroneous conclusion when applying Article 8, as set out in ground one.
28. Drawing together those matters, I am satisfied that the FtTJ fell into error in his overall assessment for the reasons that I have given and as accepted on behalf of the respondent.

29. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal 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."

30. Both advocates submit that the venue for hearing the appeal should be the FtT. I have considered their submissions in the light of the practice statement recited above. As it will be necessary for the appellant to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside and in the light of the relevant documentary evidence and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing. The Tribunal will be seized of the task of undertaking a credibility assessment and will be required to do so on the basis of the evidence as at the date of the hearing. Whether there is any need for the anonymity direction previously made by the FtT to continue should be addressed at the remitted hearing.

31. For the avoidance of doubt, there are two bundles already in the court file (and sent electronically). Any further evidence that is to be filed can be added as a further bundle; it is not necessary to replicate the bundles again.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision shall be set aside and to be remitted for a further hearing before the First-tier Tribunal.

Signed Upper Tribunal Judge Reeds
Dated 6 November 2020

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.