



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01307/2020
HU/01310/2020
HU/01312/2020

THE IMMIGRATION ACTS

Heard at Manchester (via Microsoft Teams)
On 8 July 2021

Decision & Reasons Promulgated
On 26 July 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SHAHNA VARIKODAN
ABDUL RAFEEQ VELUTHAKUNNATHUS
LIYA FATHIMSA VELUTHAKUNNATHU
(Anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bond instructed by Krishmorgan Solicitors.
For the Respondent: Mr Tan a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellants appeal with permission a decision of First-tier Tribunal Judge Burns promulgated on 24 February 2021 in which the Judge dismissed the appeals of this family unit, all citizens of India, on human rights grounds.
2. The appellant assert the Judge erred in law on four grounds.
3. Ground 1 asserts the Judge was wrong to find that matters outlined at [8] of the decision were new matters which is said to be an irrational conclusion.
4. Ground 2 asserts the decision of the Judge not to consider the factors outlined at [8] in terms of significant obstacles constituted an error of law.
5. Ground 3 assert the Judges decision and questioning a headmaster's letter at [21 - 22] is irrational.
6. Ground 4 asserts when assessing the best interests of the third appellant, a child, the Judge did not ask the basic question as to what the best interests of the child were as a freestanding issue with nowhere in the determination it appearing the Judge made a freestanding finding as to what the best interests of the third appellant child were.
7. Permission to appeal was granted by another judge of the First-tier Tribunal. The operative part of the grant being in the following terms:

"2. The first ground, argues the FtTJ erred by failing to consider within his assessment of paragraph 276 ADE (1) (vi) certain matters which the Appellants had raised regarding the risks to them on the return to India and which would normally form the basis of a protection claim.

3. I found this ground is arguable. In [11] the FtTJ wrote that most of the material appeared to be new matters, which begs the question why he did not consider those parts which were not new matters. Whilst the FtTJ might well have viewed such evidence with a healthy degree of scepticism given the timing of the disclosures and the fact the appellants had not claimed asylum, he could not simply ignore it when concluding that there were not very significant obstacles to integration. The evidence was highly relevant to the issue in hand. The FtTJ's consideration was arguably incomplete and therefore erroneous.

4. I cannot say that any error would be immaterial to the outcome."

8. The Secretary of State in her Rule 24 response dated 8 April 2021, writes:

"3. The appellants arrived in UK on 9/9/2015. Ms Varikon had a student Visa and the other two appellants were her dependents. They have made a number of applications to remain in the UK since arrival all of which were refused.

4. The application, the refusal of which, dated 6/1/2020, was the subject of the present appeal was made under family and private life on 2/10/19. No asylum application has ever been made.

5. The appellant raises a number of issues which a close scrutiny clearly indicates are applicable to an application in relation to a protection claim.

6. The Immigration Rules are clear in that an asylum application should be made at a designated place of asylum claim. The relevant rules as per following:

(para 327 IR set out)

7. It is clear that protection issues were not raised in as protection application as per the requirements of the rules and the matters relied upon by the appellants, in spite of the assertion that some of them were contained in the appellant's bundle, were indeed new matters. The judge was not seized of considering this evidence, particularly when no consent was given by the Presenting Officer.

8. It is of note that the judge considered relevant matters out with protection issues as he outlined at paragraph [11]. Furthermore, the judge, albeit in otiose remarked at [16] that there was no obligation for the appellants to live in their home area on return to India. His findings are not tainted with errors of law.

9. The remaining grounds do not have any merit. There is no qualifying child. The judge considered the best interests of children, considered both the so-called expert report and the "headmaster's letter". The judge's findings were open to him on the evidence and it is submitted that there are no errors of any materiality.

9. The Judge at [8] and [11], both appearing in the section of the decision in which the Judge considered the issues and an adjournment application, wrote:

"8. Indeed, in her witness statement for the appeal, the First Appellant set out considerable material, claiming risk and dangers in India awaiting the Appellants, including (i) the problems caused by one of her brothers in law having had a relationship with a lower caste Hindu girl (ii). Her brother having borrowed but not repaid money, resulting in quarrels and tensions (iii) threats from creditors wrecking havoc in the Appellants home (iii) religious problems from extremist Hindus (iv) religious problems from Islamists (v) extremist groups and "goons" attacking the Second Appellant's family and (vi) generalised anti-Muslim sentiment in India as demonstrated by communal riots and targeting of Muslims in Delhi and (vii) the refusal of India to acknowledge the Indian identity of Muslims.

...

11. I told the parties that while I would consider under paragraph 276 ADE(1)(vi) the usual issues such as cultural assimilation, financial means, employment opportunities and access to healthcare and education, etc, I would not consider the material summarised in paragraph 8 above. Of this material, most of it appeared to be new matters, which the Respondent had not had a chance to deal with, and which it had not consented to the tribunal dealing with it. To the extent that it had been identified in the application, the Respondent had, quite properly, in my view, declined to deal with it because a formal asylum application had not been made."

Error of law

10. There has been a recent decision of Upper Tribunal reported as [JA \(human rights claim: serious harm\) Nigeria \[2021\] UKUT 0097 \(IAC\)](#) header of which reads:

(1) *Where a human rights claim is made, in circumstances where the Secretary of State considers the nature of what is being alleged is such that the claim could*

also constitute a protection claim, it is appropriate for her to draw this to the attention of the person concerned, pointing out they may wish to make a protection claim. Indeed, so much would appear to be required, in the light of the Secretary of State's international obligations regarding refugees and those in need of humanitarian protection.

- (2) There is no obligation on such a person to make a protection claim. The person concerned may decide to raise an alleged risk of serious harm, potentially falling within Article 3 of the ECHR, solely for the purpose of making an application for leave to remain in the United Kingdom that is centred on the private life aspects of Article 8, whether by reference to paragraph 276ADE(1)(vi) or outside the immigration rules. If so, the "serious harm" element of the claim falls to be considered in that context.*
- (3) This is not to say, however, that the failure of a person to make a protection claim, when the possibility of doing so is drawn to their attention by the Secretary of State, will never be relevant to the assessment by her and, on appeal, by the First-tier Tribunal of the "serious harm" element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person's refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day. That is so, whether or not the element constitutes a "new matter" for the purposes of section 85(5) of the Nationality, Immigration and Asylum Act 2002.*
- (4) On appeal against the refusal of a human rights claim, a person who has not made a protection claim will not be able to rely on the grounds set out in section 84(1) of the 2002 Act, but only on the ground specified in section 84(2).*

11. The Judge noted in the reasons for refusal letter that the appellant had raised the possibility of communal violence in their home area and had relied on a letter recommending the family remain safe and stay away, indicating that this was raised as an issue of exceptional circumstances within the human rights claim and not as a protection claim.
12. It was accepted by Mr Tan that in light of this judgement he was in some difficulty in continuing to oppose the application. That is correct.
13. The Judge should have considered the issues identified at [8] of the determination, which were clearly not new matters, in the context of the human rights appeal but not on the basis of a protection appeal as no protection claim has been made. The Judge's failure to do so amounts to a legal error which, as it cannot be said the decision will be the same at this stage, I find to be material.
14. The appellants have therefore not had proper judicial consideration of all the evidence they rely upon in support of their appeals. They are entitled to a fair hearing. It was agreed it was therefore appropriate to set the determination aside with there being no preserved findings and to remit the appeal to the First-tier Tribunal sitting at Taylor House to be heard afresh by a judge other than Judge Burns in light of the above.

Decision

- 15. The Judge materially erred in law. I set the decision aside. This appeal shall be remitted to the First-tier Tribunal sitting at Taylor House to be heard afresh by a judge other than Judge Burns.**

Anonymity.

16. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 8 July 2021