



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

Appeal Number: PA/02703/2020 (R)

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
Parties appeared remotely by Microsoft
Teams
On 10th August 2021**

**Decision & Reasons
Promulgated
On 17 September 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**HT
(Anonymity Direction Made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Rutherford, instructed by Syeds Law Office Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

Anonymity

An anonymity direction was made by the First-tier Tribunal (“FtT”). As this appeal arises from a claim for international protection and concerns the best interests of a minor it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all parties.

Failure to comply with this direction could lead to contempt of court proceedings.

1. The hearing before me on 10th August 2021 took the form of a remote hearing using Microsoft Teams. Neither party objected. I sat at the Birmingham Civil Justice Centre. The appellant joined the hearing remotely. In proceeding with a remote hearing I was satisfied: no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied the parties have been able to participate fully in the proceedings.
2. The appellant is a national of Albania. She arrived in the United Kingdom clandestinely in May 2018 having previously made two unsuccessful applications for leave to enter the UK on a six-month short-term multi entry visitor visa. She claimed asylum on 18th September 2018. Her claim was initially refused by the respondent for reasons set out in a decision dated 23rd May 2019. The claim was certified as clearly unfounded. The appellant challenged that decision by a claim for judicial review and the claim was compromised by a consent order agreed by the parties under the terms of which the respondent agreed to withdraw the decision. The respondent issued a further decision dated 6th March 2020 that carried with it, a right of appeal. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Gill for reasons set out in her decision promulgated on 21st December 2020.

The respondent's decision

3. In the respondent's decision of 6th March 2020, the respondent concluded that the appellant does not belong to a particular social group in Albania and therefore the reason for claiming asylum in the UK is not one covered by the Refugee Convention. Nevertheless, the respondent referred to the core of the appellant's account and noted, at paragraphs

[31] and [36], that the appellant's account of events "... is deemed as being internally consistent with [her] account provided in [her] screening interview, substantive asylum interview and preliminary information questionnaire, as well as [her] witness statement submitted in support of [her] claim ...". At paragraph [37], the respondent said:

"... Consideration has been given to all of the facts of your claim, as well as any documents submitted as evidence for your claim. It is considered that the inconsistencies in your account relating to your captivity in a room and escape from the captivity goes to the core of your claim. Therefore, in terms of whether these events took place, that your father was abusive towards you, held you captive in a room and your house and threatened to kill you and [E] which forced you to leave the country, it is considered that we are unable to accept or reject your account of events and that they remain unsubstantiated. Your claim will be considered under paragraph 339L of the immigration rules."

4. The respondent went on to consider s8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and paragraph 339L of the Immigration Rules. At paragraph [49] of her decision, the respondent said:

"Taking all of the above into consideration, in the round, your general credibility has been established. It is considered that there is good reason to apply the benefit of the doubt to this core aspect of your claim and as such your claim of experiencing problems in Albania from your family, and in particular your father, as a result of your relationship with [E] has therefore been accepted."

5. The respondent went on to address whether the appellant would be at risk on return to Albania and concluded that the background material demonstrates avenues of redress available. The respondent concluded that the authorities in Albania are able to provide the appellant with effective protection. The respondent concluded that in any event, the appellant can freely move within Albania to an urban area away from Durrës, where she fears her father and family. The respondent concluded that irrespective of the merits of the claim, the appellant has failed to establish that it would be unreasonable to expect her to live in Shkoder, Vlore, Sarande or anywhere else in Albania.

The decision of the First-tier Tribunal

6. The background to the appellant's claim for international protection is set out at paragraphs [6] to [10] of the decision of Judge Gill. At paragraphs

[14] to [16], Judge Gill refers to the reasons given by the respondent for refusing the claim for international protection in her letter dated 6th March 2020.

7. At paragraph [20] of her decision, Judge Gill refers to the evidence that was before the Tribunal and relied upon by the respondent. She refers to a supplementary bundle filed by the respondent on the day of the hearing containing 106 pages with documents appertaining to previous Visa applications made by the appellant.
8. At paragraphs [22] to [27] of her decision, Judge Gill refers to a preliminary issue that arose at the outset of the hearing before her. At the hearing, the respondent sought to withdraw the concession of credibility set out in her decision letter, in light of the supporting documents attached to the previous Visa applications made in September and October 2017. Judge Gill records the application to withdraw the concession was opposed by the appellant's representative. At paragraphs [24] and [25] of her decision, she said:

"24. I accepted that the application to withdraw the concession came very late in the day, on the day of the substantive hearing which was listed for the first time. Mr Sansom stated that he (sic) concession should never have been made. Both parties accepted that the appellant would be prejudiced if the application was granted, necessitating further work, which would have financial implications as the appellant is privately funded.

25. Given that the respondent had presented the case on the wrong footing, the decision of the Tribunal would be predicated upon incorrect grounds. Therefore, in the interests of justice I did grant the respondent's application to withdraw the concession to enable the respondent to submit a supplementary letter and file and serve the additional documents."

9. At paragraph [26], Judge Gill records that the Presenting Officer sought an adjournment, but that was opposed by the appellant's representative on the basis that he could deal with credibility issues by way of submissions. At paragraph [27], Judge Gill records that as the appellant's representative was content to proceed, she decided the hearing should continue. She records that the inconsistencies in the appellant's account had been fully explored by the respondent at paragraphs [30] to [37] of the respondent's decision and the appellant had been questioned during the asylum interview, regarding the support of her father referred to in the previous Visa applications.

10. The findings and conclusions of Judge Gill on the appellant's claim for international protection are set out at paragraphs [42] to [63] of her decision. Judge Gill rejected the core of the appellant's account regarding her escape from her family home, the control and abuse that she was subjected to by her father, the threats made by her father, her contact with her partner, and her exit from Albania. In light of the findings made, she concluded that the appellant's claim for asylum and humanitarian protection cannot succeed.

The appeal before me

11. The appellant claims the respondent, in her decision of 6th March 2020, accepted the appellant to be credible having considered the discrepancies in her account. It is said that at the hearing of the appeal the Presenting Officer made an application to withdraw the "credibility concession", simply seeking to rely upon the previous applications for entry clearance which the Presenting Officer considered, undermined the concession made. The appellant claims nothing was mentioned about the other discrepancies that have been highlighted in the respondent's decision letter. It is said that as the appellant was capable of addressing the new material relating to the previous applications and the supporting documents at the hearing, without the need for an adjournment, the appellant was content to proceed. The appellant claims Judge Gill erroneously went on to consider the appellant's claim and her credibility as a whole and made adverse findings that go to the core of the claim and extend far beyond a consideration of the previous applications for entry clearance and the extent to which those applications and the evidence in support, undermined the core of the appellant's account.
12. Permission to appeal was granted by Upper Tribunal Judge Grubb on 15th February 2021. He said:

"It is arguable on the basis of the grounds that the proceedings were unfair as the judge, having allowed the HOPO to withdraw the concession that the appellant was credible, went beyond the scope of the issues that became live in relation to the appellant's credibility. That is certainly one reading of the grounds which merit further consideration at an oral hearing. It is difficult, at this stage, to disentangle any of the paragraphs in the grounds that raise points which may not be connected to any unfairness. Permission to appeal is granted on all grounds."

13. The appellant's grounds of appeal are prolix and beyond the claim that the decision is vitiated by procedural unfairness because of the way in which matters progressed following the decision to allow the respondent to withdraw the concession made in her decision, the task of the Tribunal is hindered by the failure fail to properly delineate the grounds and identify the errors of law relied upon.
14. At the outset of the hearing before me I indicated to the parties that it is unfortunate that I have not been provided with a witness statement from Mr Hussain, the appellant's representative before the First-tier Tribunal, explaining his understanding of how matters were to progress following the decision of Judge Gill permitting the respondent to withdraw the concession previously made by the respondent. It is apparent from what is said at paragraph [27] of the decision of Judge Gill that contrary to what Mr Hussain may have understood, once the judge had granted the respondent's application to withdraw the concession previously made, it was envisaged that the judge would be considering the credibility of the appellant's account as a whole, taking into account the inconsistencies in the account referred to in the respondent's decision. Regrettably I have no explanation before me as to why Mr Hussain erroneously believed that Judge Gill would limit her consideration of the appellant's account and only consider the extent to which the account is undermined by the further documents (i.e. the previous visa applications) relied upon by the respondent. It should have been apparent to a reasonably competent representative that once the credibility concession had been withdrawn, the Tribunal Judge would reach her own findings and conclusions upon the appellant's account of events.
15. Ms Rutherford submits there was clearly a misunderstanding regarding the impact of the withdrawal of the concession and the extent to which the Tribunal would be revisiting any of the respondent's previous concerns about the core of the appellant's claim. She submits Mr Hussain appears to have proceeded upon the premise that the credibility issues relied upon by the respondent were only those that arise from the documents that had been provided to the Tribunal by the respondent on the day of the hearing and could be addressed by submissions. She submits this is a claim for international protection and the appellant should not be prejudiced because of the way in which matters unfolded on the day of the hearing.

16. Mrs Aboni relies upon the rule 24 response dated 19th March 2021 that has been filed and served by the respondent. She submits it is clear from the respondent's decision that there were concerns about the credibility of the core of the appellant's account. The appellant was initially given the benefit of the doubt, but it had become apparent to the Presenting Officer at the hearing before the First-tier Tribunal that the concession made in the respondent's decision regarding the credibility of the core of the appellant's account had been erroneously made, in light of the information contained within the previous applications for entry clearance and the evidence relied upon by the appellant in support of those applications. Once the First-tier Tribunal Judge had granted the respondent permission to withdraw the concession, the Presenting Officer had taken a perfectly proper approach, by making an application for an adjournment to enable the respondent to submit a supplementary letter and formally serve the additional documents relied upon by the respondent. That sensible course proposed by the Presenting Officer was opposed by the appellant's representative. Mrs Aboni submits that once the credibility concession was withdrawn, Judge Gill was entitled to have regard to all the inconsistencies in the appellant's account and reach her own findings and conclusions regarding the claims made by the appellant. She submits Judge Gill reached a decision that was open to the Judge on the evidence before the Tribunal.

Discussion

17. The appellant does not challenge the decision of Judge Gill to permit the respondent to withdraw the concession previously made by the respondent regarding the credibility of the core of the appellant's claim. It is the Tribunal's consideration of the appellant's claim thereafter, and the extent to which the appellant's credibility remained in issue, that is the focus of the appeal before me.
18. I have already said that it is regrettable that I do not have a witness statement from Mr Hussain explaining his understanding of how matters were to progress. I have to say it is surprising that in an appeal arising from the refusal of a claim for international protection where the credibility of the appellant is in issue, even if that is only to the limited extent understood by Mr Hussain, in the absence of good reason why the

appellant could not give evidence, she was not called to give evidence at all.

19. There can be no criticism of Judge Gill for the way in which she dealt with the appeal and the way in which she went on to make her own assessment of the credibility of the appellant and the core of her account. She was faced, on the day of the hearing, with an application to admit further evidence from the respondent, and an application to withdraw a concession previously made by the respondent. Having decided the applications in the respondent's favour, it is unsurprising that there was an application by the Presenting Officer for an adjournment to enable the respondent to submit a supplementary letter and to formally serve the additional documents relied upon. For reasons that are unexplained by Mr Hussain, knowing that the previous credibility concession had been withdrawn, opposed the application for an adjournment and was content to proceed and deal with any prejudice to the appellant. Given that stance adopted by the appellant's representative, I can only assume, on instructions, it was unsurprising that Judge Gill went on to consider the credibility of the appellant and reach her own findings as to the account relied upon by the appellant.
20. I am however persuaded that there appears to have been a misunderstanding on the part of Mr Hussain as to the extent to which Judge Gill would be considering the core of the appellant's account and in particular, the inconsistencies in her account previously identified by the respondent in her decision. However misconceived or erroneous the understanding of Mr Hussain may be, at the heart of this appeal lies a claim for international protection. Although I have considerable sympathy with the submissions made by Mrs Aboni and the entirely valid points she makes, there is in the end, an issue of fairness, and I cannot ignore the late stage at which the respondent had made the applications to withdraw the concession and to adduce further evidence, which then had implications upon how the hearing progressed, and possibly impacted upon the parties understanding of the credibility issues that the Judge would consider.
21. Fairness is an essential component of the judicial process. An individual is entitled to know of the case against them and to an effective opportunity to answer that case. Although I accept that natural justice

does not generally include the failings by the party or their representatives, the appeal concerns a claim for international protection made by the appellant, who also has a young child. I am satisfied that the appellant should not suffer any prejudice because of the procedural errors of her representative and that it is in the wider interests of justice to set aside the decision of the First-tier Tribunal given the way in which matters developed during the hearing of the appeal. In MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside. The authorities referred to by the Upper Tribunal in MM make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness.

22. I re-iterate that there can be no criticism of Judge Gill, but I accept that the decision of the Judge Gill is infected by an error of law arising from the unfairness that arose from the misconceived understanding of Mr Hussain that the Judge would only be considering the credibility of the appellant insofar as it was undermined by the additional documents. He appears to have understood that Judge Gill would not be considering all the inconsistencies that had previously been identified by the respondent in the appellant's account and that the appellant was not required to establish her entire claim. In the absence of any explanation from Mr Hussain I am satisfied that his understanding was entirely misconceived and without any foundation. It is difficult to see how the Judge could be expected to disentangle the evidence and make proper credibility findings without considering the evidence as a whole, and in particular, the inconsistencies in the appellant's account and how her account has developed.
23. In my judgment the appropriate course is for the decision of First-tier Tribunal Judge Gill to be set aside. In the circumstances I do not need to address the other grounds of appeal relied upon by the appellant. As to disposal, the parties agree that the appropriate course is for the matter to be remitted to the FtT for hearing *de novo* with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

24. The decision of First-tier Tribunal Judge Gill to allow the respondent to withdraw the concession made in the respondent's decision of 6th March 2020 regarding the appellant's credibility as to the core of her account is not challenged by the appellant and is preserved. The parties agree that it would be sensible for the respondent to file and serve a supplementary decision, as had been proposed by the Presenting Officer at the hearing before the First-tier Tribunal, before the appeal is heard.
25. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

26. The appeal is allowed, and the decision of FtT Judge Gill promulgated on 21st December 2020 is set aside.
27. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.
28. The decision of First-tier Tribunal Judge Gill to allow the respondent to withdraw the concession made in the respondent's decision of 6th March 2020 regarding the appellant's credibility as to the core of her account, is preserved. The respondent shall file and serve a supplementary decision in light of the withdrawal of the concession regarding the credibility of the appellant, within 42 days.
29. I make an anonymity direction.

Signed **V. Mandalia**
2021

Upper Tribunal Judge Mandalia

Date: 11th August