



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13251/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 28th June 2018

Decision & Reasons Promulgated
On 16th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

Mrs S P K
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Miss S Tabassum, Counsel, instructed by Broudie Jackson and Canter.
For the respondent: Mr C Bates, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant made a claim for protection on 4 February 2015. She is a Sri Lankan national of Tamil ethnicity. She claimed to have arrived in the United Kingdom on 19 January 2015, having left her home country on 1 November 2014. She gave birth to her daughter in Liverpool on 22 January 2015.
2. The appellant's parents and grandmother had been living in France since 2008 along with her younger siblings, her father having arrived 1st in 2004. They have been granted refugee status, but she was ineligible because she was over 18. After they left she went to live with her paternal uncle.

3. She said she was at risk because of her association with RK who she said was the father of her child. His elder brother had been killed in 2008 by the Karuna group and they were harassing him. His father had been granted refugee status here. His wife and another son were able to join him under the family reunification rules but RK, as an adult, could not benefit. RK left Sri Lanka in 2013 and came to the United Kingdom. He was allowed to remain following an appeal on article 8 grounds outside the rules and in August 2015 was granted indefinite leave to remain.
4. Before RK left he had been living in a Hindu temple run by the appellant's uncle for several weeks and the appellant met him. After he arrived in the United Kingdom he contacted the appellant's uncle via Skype and asked if he could speak to the appellant and through this a relationship developed. They then met in India in April 2014 where the appellant had been staying with her aunt. He then proposed marriage and they had a traditional ceremony with the intention of the appellant joining him in the United Kingdom and having a more formal wedding. She said when she returns to Sri Lanka the Coruna group had learnt of the marriage and started asking her about her husband. They told her to attend an enquiry and rather than do this she moved to live with in-laws before arranging to come to the United Kingdom.
5. The respondent's records confirm that RK had been granted leave on 6 February 2013. However, the relationship between the appellant and he was not accepted. The respondent made the point that on her account she had only known him the brief time he was at her uncle's temple and then he left the country. Thereafter it was only when he made contact again with her uncle that they spoke infrequently on Skype. It was not accepted that given this limited contact he would have proposed marriage and that they married immediately. Because the relationship was not accepted then the threat from the Karuna group was rejected. The respondent rejected her explanation for not leaving the area sooner after saying she received a letter from the Karuna group and failing to report as they had required. After she moved she had no further problems.

The First tier Tribunal.

6. The appellant's appeal was heard before First-tier Judge Tobin on 24 January 2018. Miss S Tabassum, Counsel then appeared for the appellant as she does now. There was no representative for the respondent. The judge heard from the appellant and RK. At paragraph 18 onwards the judge sets out the conclusions. The judge found the appellant was evasive and did not give an honest account. She was questioned about when she 1st met RK and then about the circumstances of her marriage. Paragraph 21 records the appellant's explanation that the marriage could not be registered in India because application had to be made beforehand and the marriage had not been prearranged. There was no documentation to confirm the registration process. She was asked about her journey to the United Kingdom, which again the judge concluded was untrue. At paragraph 24 onwards the judge deals with the evidence of RK and he was criticised for describing himself as a refugee, with the judge concluding he had been given leave under the family reunion policy. The judge found

inconsistencies in his account about contact with the appellant and her aunt and the circumstances of their marriage.

7. After further questioning the judge concluded there was no marriage ceremony and did not accept there was any traditional marriage. The judge was critical of the fact they had not arranged a marriage in the United Kingdom.
8. At paragraph 31 the judge referred to the demeanour of the appellant and RK as leading him to have grave doubts about their accounts. The judge referred to them looking uneasy in addressing straightforward matters. The judge referred to their evidence as incredible and contradictory, with inconsistencies about the marriage proposal and the arrangements.
9. The judge referred to the birth registration in the United Kingdom. Referring to the negative credibility view formed the judge found reliance could not be placed upon the birth certificate. The judge concluded by finding that the relationship was not genuine and subsisting and did not place any reliance upon the documentation produced. The judge also rejected photographs and documentation in support of the ongoing relationship, describing the appellant and RK as consummate liars (para 32).
10. At paragraph 33 the judge refers to the absence of corroboration that the Karuna group pose a threat to the appellant.
11. The judge deals with the child in 4 short paragraphs. The judge found that her best interests were in remaining with her parents but did not believe this was a family unit. Such was the judge's level of distrust of the account given he said he would only accept this if there were incontrovertible DNA evidence. In the alternative, if they were a family unit the judge did not accept that RK could not return to Sri Lanka, pointing out he was not someone with refugee status. The judge concluded that the children are not British citizens and that the whole case was based on deception. The judge concluded that if they were a family unit they could return to Sri Lanka.

The Upper Tribunal.

12. The permission to appeal application argues that the respondent had not disputed that RK was the father of the appellant's daughter. It was pointed out he was named on the child's birth certificate. The judge in requiring DNA evidence before being satisfied was to impose to high and evidential standard. It was argued that RK could not return to Sri Lanka because albeit he was not confirmed as a refugee in his appeal the judge had found the family were at risk and his circumstances were linked to that of his father who had been granted refugee status.
13. Permission to appeal was granted on the basis it was arguable that the judge erred in not accepting paternity of the appellant's child when this was not an issue. It was also arguable that the judge relied on the respondent's refusal letter without considering the issues in light of all of the evidence.

14. At hearing the grounds in the permission application were developed by Miss S Tabassum. She set out RK circumstances whereby his family members were granted refugee status, but he was overage and so was granted leave outside the rules. The judge had refused to acknowledge he would have difficulties in Sri Lanka.
15. The judge had refused to place reliance upon the birth certificates and had required DNA evidence before being satisfied of paternity. She submitted this was to impose to higher standard of proof. Paternity had not been disputed in the refusal letter.
16. Mr. Bates acknowledge that the genuineness of the relationship between the appellant and RK was central to the claim as her claim was that she was at risk because of her association with her in-laws. Her father had left the country in 2005 and she only referred to problems after she became involved with RK. The Secretary of State did not accept the claimed relationship between the appellant and RK and so impliedly were not accepting paternity either. He accepted there was no requirement for DNA evidence but pointed out that birth certificates are dependent upon the information told the registrar. The judge had applied the principles in Tanveer Ahmed to the documents PK. He contended that given that the refusal letter had queried the relationship it would not have been unreasonable to expect the appellant as part of her proofs to seek DNA evidence. He submitted that at the time of the hearing the appellant child had not been accepted as a British citizen and the position was still undetermined.

Conclusions.

17. There was no presenting officer in attendance before First-tier Judge Tobin. Generally, in the absence of a presenting officer the reasons for refusal letter can be taken as the basis of the respondent's case. If the judge feels there are particular issues not covered then he should mention this to the appellant's representative. In the instant case the reasons for refusal letter clearly disputes the claimed relationship between the appellant and RK. I take Mr Bates point that impliedly therefore the paternity of the appellant's child was not accepted. Nevertheless, to approach an appeal on the basis of something implied is to move away from a sound foundation.
18. Surendran v SSHD set out guidelines for judges where the Home Office was unrepresented. Whilst this has not been raised in the grounds of the application the decision does not indicate this guidance was followed. The guidance is that the judge raises issues of concern with the appellant's representative, asking them to go over this with the appellant. This is far from ideal however because it can place the representative in an invidious position. The aim however is to avoid the judge entering the arena and cross-examining the appellant and the witnesses. Sometimes in practice the judge will find it more effective to avoid the middleman as it were and ask the areas of concern directly, but this must be done with restraint. The impression from the decision is that the judge did in fact enter the arena and effectively cross-examined the appellant. In fairness there is no record of the appellant's representative raising this issue with the judge.

19. The judge clearly formed an adverse view of the appellant and RK. It was a matter for the judge to assess their evidence and to decide what weight to attach to it. Whilst firm conclusions are desirable and robust expressions add to clarity the judge here on occasion uses intemperate expressions which undermine the decision. For instance, there is reference to the party's demeanour which in general is not considered to be a reliable guide for the assessment of credibility. There is reference to an absence of corroborative evidence, for instance of threats from Karuna, when there is no requirement for corroboration. These points have not been raised in the application, but I refer to them to place the issue of paternity in context.
20. The judge dismisses the birth certificate out of hand without any discussion of the legal presumptions which arise (as it pre dates the 10th Sept. 2015 changes by the British Nationality (Proof of Paternity) Regs 2015. The judge at paragraph 31 states `... There does appear to be two children...' The papers I have only indicate the one child born on 22 January 2015. If there was a 2nd child by the time of hearing in January 2018 this should have been explored more fully.
21. The judge clearly gave a prisoner to fortune in stating at paragraph 37 `I do not believe that this is a family unit. I would only believe it was if DNA evidence could be provided which was incontrovertible such is my level of distrust... '.
22. The grounds were narrowly drafted and some of my comments go beyond those but help to put the paternity issue in context. I find the judge materially erred in how this was dealt with in relation to the evidential burden. Other arguments could also have been raised in relation to this elsewhere in the decision, but this one example is sufficient to render the decision unsafe.

Decision.

The decision of First-tier Tribunal judge Tobin dismissing the appellant's appeal materially errs in law and cannot stand. The decision will have to be remade de novo in the First-tier Tribunal.

Francis J Farrelly

Deputy Upper Tribunal Judge

15 August 2018