



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

Appeal Numbers: PA/11561/2018
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THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 19 July 2019**

**Decision & Reasons
Promulgated
On 07 August 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S (1)

MM (2)

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr C Bates, Home Office Presenting Officer

For the Respondents: Mr M Karnik, Counsel

DECISION AND REASONS

Introduction

1. In these linked appeals the respondents are both Russian nationals with Chechnyan ethnicity. The first respondent ('S') is a married woman and the second appellant ('MM') is an unmarried woman who is S's sister-in-law, that is MM is the sister of S's husband. S and MM

have both made asylum claims and for that reason I anonymise their names.

2. This is an appeal by the Secretary of State for the Home Department ('SSHHD') against the decision of First-tier Tribunal ('FtT') Judge P J Holmes sent on 28 February 2019, allowing the linked appeals of S and MM on asylum grounds.

Background

3. As Judge Holmes noted at [2] of his decision the background to the asylum appeals of S and MM cannot be properly understood without some reference to S's husband's circumstances. I shall refer to him as M. M is also a Russian national with Chechnyan ethnicity. He applied for asylum after fleeing Russia in June 2017. He alleged that he had been abducted from the street on 1 June 2017, detained at a security base by persons he believed to be paramilitary guards acting on behalf of the Chechnyan authorities who tortured him and accused him of being gay. He claimed that his family secured his release on 8 June 2017 by means of bribery, but the authorities nevertheless came looking for him. He therefore fled Russia. His asylum claim was refused by the SSHHD on 24 September 2017 and he appealed against this decision to the FtT. After a hearing on 8 November 2017 FtT Judge Lloyd-Smith dismissed M's appeal observing that he had not established that there was any truth in his account. Permission for onward appeal was refused.
4. M and S rely upon M's claimed, albeit rejected history, in Chechnya, but have added to it during the course of their asylum interviews. They were both interviewed separately by different officers. S was interviewed in depth about her husband's claim but went into considerable detail as to events after her husband's failure to return home. Military men in black uniforms burst into her home with guns looking for M when MM was present. MM was hospitalised as a result of the shock and distress that she faced. There were then further developments because S and M's brother were summoned to attend a police station where S was questioned and threatened. She also explained that M's brother was taken to a separate room where he was tortured with electric shocks. After this she was released and went to live in a different part of the country with MM and S's two children. They were visited by local policemen but there was no violence until 15 December 2017 when there was another raid with armed and masked men. S sustained an injury and both S and MM moved again. They felt unsafe and left Russia.
5. They claimed asylum on 4 March 2018. Their applications for asylum were refused in separate decision letters written by different officers but both dated 18 September 2018. The SSHHD accepted that S and MM are Chechnyan but did not accept their account that led them to

flee Chechnya. This was largely based upon the adverse findings of fact made by Judge Lloyd-Smith when she dismissed M's appeal. S and MM appealed their negative asylum decisions to the FtT. The matter first came before the FtT on 30 October 2018 when FtT Judge Birrell adjourned the hearing to enable the then appellants to obtain legal representatives. Notwithstanding that adjournment, when the matter next came before the FtT on 12 December 2018, S and MM were unrepresented. They again applied for an adjournment but that application was refused by Judge Holmes. Judge Holmes also noted that there was no Presenting Officer available to represent the SSHD and he had received no written submissions from the SSHD and therefore presumed that the SSHD's case was based upon the decision letters in each of the appeals. That meant that the Judge Holmes had the difficult task of determining a detailed and complex asylum appeal in relation to two linked appellants without legal representation from either party.

6. It is clear from the decision itself that Judge Holmes considered Judge Lloyd-Smith's decision and indeed the whole file pertaining to M. Having done so, Judge Holmes used that decision as a starting point but then departed from it insofar as he accepted the evidence provided by S and MM that their respective husband and brother, M, had come to the adverse attention of the authorities and that they too had been threatened and harmed as a result of that. He therefore allowed the linked appeals on asylum grounds.
7. The SSHD sought permission to appeal to the Upper Tribunal relying upon written grounds of appeal. Both grounds focus upon the submission that Judge Holmes was bound by the settled findings reached by Judge Lloyd-Smith. Permission to appeal was granted by FtT Judge Hodgkinson on 2 April 2019 who made the following observation:-

"The grounds argue that the Judge erred by failing correctly to apply the Devaseelan Guidelines (Devaseelan v SSHD [2002] IAT 702), with reference to an earlier dismissed appeal of the first appellant's husband/second appellant's brother, that earlier appeal being based upon the same factual matrix as that relied upon by the current appellants as elaborated upon in the grounds".

Hearing

8. At the hearing before me Mr Bates clarified the grounds of appeal. He submitted that Judge Holmes failed to give adequate reasons for concluding that there were very good reasons to justify a departure from the findings made by Judge Lloyd-Smith. Mr Bates helpfully took me to the decision of Judge Lloyd-Smith and pointed out the nature and extent of the concerns that she had regarding M's evidence. In particular, there were concerns regarding inconsistencies within the

interview, discrepancies, implausibilities, a failure to properly explain the absence of a summons and a failure to properly explain how M was able to go in and out of the country if he was at risk.

9. Mr Karnik invited me to find that Judge Holmes had clearly read Judge Lloyd-Smith's decision and was well-aware of those adverse findings but was entitled to depart from the findings for the key reasons provided by the judge: there were new witnesses who gave further detailed evidence; there was further country background evidence which made it clear that M's account was plausible, and; the SSHD accepted that S and MM were Chechnyans whereas he did not accept that M was a Chechnyan.
10. Mr Karnik invited me to find that Judge Holmes's approach was entirely consistent with the Devaseelan principles as applied in subsequent authorities.

Legal framework

11. Both representatives agreed that the law is essentially settled in this area. They also agreed that Judge Holmes properly directed himself to the Devaseelan guidelines and sought to apply those guidelines in this case – see [18] and [20] of his decision. At the hearing the parties relied upon AL (Albania) v SSHD [2019] EWCA Civ 950. Since the hearing the relevant authorities have been summarised in SSHD v BK (Afghanistan) [2019] EWCA Civ 1358, 30 July 2019. The summary at [31-39] is consistent with the position agreed by the parties before me but re-emphasises at [43-44] that every tribunal must conscientiously decide the case in front of them, albeit the tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal.

Discussion

12. The key question raised in this appeal is whether Judge Holmes has identified very good reasons for departing from Judge Lloyd-Smith's adverse credibility findings regarding M. In my judgment his reasoning must be viewed in context. This includes the fact that Judge Holmes did not have the benefit of any legal representation. It is surprising that the SSHD was unrepresented in this rather important case for three individuals as it turns out. There was no adjournment sought from the SSHD. This is a case that had already been adjourned by the FtT and the SSHD would have been aware that it was in the system and it was due to be heard again. Notwithstanding the absence of representation it is clear that Judge Holmes took every effort to acquaint himself with the appeal proceedings relating to M. He confirmed at [2] and [8] of his decision that he had a copy of Judge Lloyd-Smith's decision and that he had

read it. At [19] he records that the file relating to M had been put before him. He described in a great amount of detail what that file contained including 23 items of country guidance. Judge Holmes summarised the findings made by Judge Lloyd-Smith and noted this:-

“The focus of the judge’s decision was upon Mr M’s interview records, his written and oral statements and such supporting documents as he produced (although ultimately little weight was given to the latter). The judge found that Mr M was not a reliable witness, he did not have a well-founded fear of persecution and there were no substantial grounds for believing that he would be at risk of serious harm upon return to Russia.”

13. Judge Holmes also had the benefit of three witnesses to provide evidence before him: L, MM and M. That is so is set out at [12] of his decision. Mr Bates observed that there was no detailed reference made to M’s evidence. Of course, in a case such as this where there was no representation from the SSHD, there could be no cross-examination. Finally, when the decision is read as a whole it is undoubtedly a carefully structured and extremely detailed decision. I now turn to the specific reasons provided by Judge Holmes for his view that the evidence might have been similar in certain respects but could not be described as the same and in fact in certain material respects was substantially different to the evidence available to Judge Lloyd-Smith. These come in three broad categories: country background evidence; witnesses; Chechnyan ethnicity.

Country background evidence

14. Judge Holmes observed the following at [20] of his decision:-

“The present appeals do not constitute a case where (to adopt the language used in Devaseelan) the second adjudicator should regard the issues as settled by the first adjudicator’s determination. Not only are the parties different in this case, but I find a pressing need to consider the appeals before me in the light of the degree to which the factual allegations on which these appeals rest may be consistent with up-to-date country background information. This is because whatever might have been the situation according to the evidence available at the time when Mr M’s appeal was heard, it is clear to me that there is now an overwhelming weight of evidence from reliable and impartial sources of great authority that in Chechnya the state persecutes gay people and those who are perceived as being of that orientation; and I take the view that an integral part of the assessment of credibility in these appeals would be missing if I failed to note that the country background evidence has significantly changed since 2017, reflecting the growth of a chorus of international disapproval of the behaviour of the Chechnyan and Russian authorities.”

Just pausing there, when Judge Holmes said that the country background evidence had significantly changed, it seems that what he meant is that there was more evidence describing the prevailing circumstances for those who were perceived to be gay, when M claims to have been targeted. That is clear from [28] of his decision where Judge Holmes found that Mr M's claim to have fallen foul of the Chechnyan authorities in June 2017 was plausible and substantially consistent with the country background evidence he considered that was unavailable to Judge Lloyd-Smith. It should be noted that Judge Lloyd-Smith heard the appeal in November 2017 and that was based upon events that took place just a few months previously in June 2017. Human rights reports tend to be based on the annual year and many would have been unavailable to Judge Lloyd-Smith as at November 2017. It is therefore unsurprising that there was considerable more evidence in support of M's claim by the time the matter reached Judge Holmes in December 2018. Judge Holmes summarised the country background material before him at [21] to [23]. That can be summarised as indicating that in 2017 the relevant authorities took a very dim view of anyone perceived to be gay and they were subjected to systemic persecution at the time.

15. I note that part of Judge Lloyd-Smith's reasoning for rejecting M's account related to the apparent plausibility of his claims. She did not accept that one text message might lead to a perception that a person is gay. She did not accept that the appellant's explanation for his actions which led the authorities to the view that he was gay would have been disbelieved by them. Judge Lloyd-Smith also found it implausible that the authorities would be monitoring devices. In order to fairly determine the appeals before him, Judge Holmes quite properly took into account the updated country background evidence, unavailable to Judge Lloyd-Smith.

Witnesses

16. There were obviously two additional significant witnesses to M's account: his wife and his sister. Judge Holmes noted that the decision letters regarding those two witnesses did not deal with their credibility but focused upon M's credibility. Judge Holmes heard evidence from those two witnesses and found them to be truthful and reliable. It is important to note that their evidence was not restricted to matters which gave rise to M's departure from Russia, but went on to deal with the consequences that they faced after his departure. They both gave evidence that they were threatened and harmed. That clearly was not evidence available to Judge Lloyd-Smith because when she heard M's appeal those witnesses were not in the UK. In those circumstances, in my judgment, Judge Holmes was entitled to find as he did at [31] of his decision that S and MM were truthful and reliable witnesses, notwithstanding the adverse findings made against M by Judge Lloyd-Smith.

Chechnyan ethnicity

17. Judge Holmes said this at [24]:

“A significant feature of the present appeals is that in each case the respondent’s decision letter expressly accepts that the appellant is Chechnyan ... This is in striking contrast with the position adopted by the respondent in the case of Mr M ... with which Judge Lloyd-Smith seems to have concurred, or at least did not expressly disagree. It is a serious logical anomaly since Mr M is the second appellant’s brother and there is no evidence to support any rational distinction between the respondent’s findings as to their respective ethnicity.”

18. Mr Karnik made the point that as Judge Lloyd-Smith had appeared to doubt M’s Chechnyan ethnicity, that went to the root of her adverse findings. Of course, if he was not Chechnyan, what he claims to have happened in Chechnya could not have taken place. When this is viewed together with the additional evidence, that is the country background evidence and the additional witnesses evidence, there is ample support for Judge Holmes’ decision that he should depart from the findings of Judge Lloyd-Smith.

Approach to Judge Lloyd-Smith’s adverse credibility findings

19. In persuasive submissions Mr Bates emphasised the nature and extent of the adverse credibility findings made by Judge Lloyd-Smith. He emphasised that these were not limited to matters relating to implausibility or the country background evidence and extended to significant discrepancies in his evidence. Mr Bates pointed out that Judge Holmes did not address any of these adverse credibility findings and was obliged to do so if he was going to depart from Judge Lloyd-Smith’s adverse credibility finding regarding M.

20. Whilst I accept that Judge Holmes did not refer to each one of the specific findings reached by Judge Lloyd-Smith, when Judge Holmes’s decision is read as a whole, I am satisfied that he has provided sufficient reasons for departing from the findings of Judge Lloyd-Smith. His reasoning is tolerably clear. It is sufficiently clear that he regarded the witnesses’ evidence that was not available to Judge Lloyd-Smith to be significant, and perhaps more importantly to be truthful and credible. As I have already indicated, that went beyond M’s account, although much of it was predicated on what happened to M in the first place.

21. When the three particular reasons that I have set out above are combined together, in my judgment Judge Holmes has not erred in law. He has correctly directed himself to the Devaseelan principles as applied in subsequent authorities. He has correctly approached Judge Lloyd-Smith’s decision as the starting point for his consideration of the linked appeals and when the reasons that he has provided for

departing from those findings are considered cumulatively, they constitute very good reasons for departing from those findings.

22. It follows that the SSHD's grounds of appeal have not been made out.

Notice of decision

23. The SSHD's appeal is dismissed and the decision of FtT Judge Holmes stands.

Direction regarding anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed

Date

UTJ Plimmer
Upper Tribunal Judge Plimmer

6 August 2019