Upper Tribunal (Immigration and Asylum Chamber)

Appeal Numbers: UI-2021-000885
[HU/05747/2020]

THE IMMIGRATION ACTS

Heard at Field House
On 31 March 2022

Decision & Reasons Promulgated
On 19 July 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE NAJIB

Between

GKS (INDIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Moriarty, instructed by Elaahi & Co Solicitors
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. This decision is in short form as it is agreed between the parties that the First-tier Tribunal erred in law and that its decision falls to be set aside in full.

Background

2. The appellant is an Indian national who was born on 29 July 1985. She is married to another Indian national, DS, and they have twin daughters, who were born on 31 August 2019. The whole family lives together in the UK without leave to enter or remain.

3. The appellant entered the UK as a student in 2009. She had leave to enter in that capacity until September 2011 but all subsequent attempts to obtain further leave to remain, whether by application or on appeal, have been unsuccessful.

4. On 24 December 2019, the appellant made an application for leave to remain on human rights grounds. Subsequently, on 6 February 2020, her representatives wrote a detailed letter in support of the application. The submission made in that letter was essentially that the appellant had accrued a private life in the UK and that it would be disproportionate to remove her because she had since 2013 been improperly accused of using a proxy in her TOEIC English language test.

5. The appellant's application was refused on 30 April 2020. The respondent decided that the appellant fell for refusal on suitability grounds on account of TOEIC deception. She did not accept that the appellant met the eligibility requirements of Appendix FM in any event. She did not accept that there would be very significant obstacles to the appellant's re-integration to India, or that her return would be contrary to Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed. Her appeal was heard by First-tier Tribunal Judge Abebrese, sitting remotely at Taylor House, on 19 July 2021. The judge heard evidence from the appellant and her husband. They spoke to their family life with their daughters. He stated that he had an outstanding asylum appeal. The appellant denied that she had cheated in her TOEIC test. The judge heard submissions from the representatives before reserving his decision.

7. In his reserved decision, the judge found against the appellant in respect of the TOEIC allegation: [15]. He found that it would be proportionate to remove her from the UK: [16]-[18].

The Appeal to the Upper Tribunal

8. The grounds of appeal to the Upper Tribunal may be summarised quite shortly. It was submitted: (i) that the FtT failed to undertake any assessment of the best interests of the appellant's children; (ii) that the FtT had misdirected itself in law in its consideration of the TOEIC issue; and (iii) that the reasoning of the FtT was legally deficient in various respects.

9. First-tier Tribunal Judge Handler granted permission on each of these grounds in a decision dated 12 November 2021.

10. On 16 December 2021, by a response filed under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent accepted that the judge had fallen into error as described in the grounds of appeal and invited the Upper Tribunal to set his decision aside in full.

Analysis

11. As we stated to Mr Moriarty and Mr Walker at the hearing, we accept that the respondent's concession is properly made and that the decision of the FtT cannot stand. It contains no assessment of the best interests of the appellant's children. That was not an altogether straightforward assessment to undertake, as she and her daughters live with DS, who had a pending trafficking claim and asylum appeal (reference PA/50749/2020) at the time that the appeal was before the FtT. At that stage, it might properly have been thought that he could not be expected to leave the UK and that the appellant's removal would deprive the children of contact with either her or her husband. That complexity was simply not addressed by the judge. The first ground is plainly made out.

12. The same is true of the second ground. Amongst other matters, it is submitted in this ground that the judge mis-stated the burden of proof in respect of allegations of deception or dishonesty. The ground is so well-trodden jurisprudentially that we need not cite any authority. In respect of an allegation such as this, the burden is on the respondent and the standard of proof is the balance of probabilities. Although this is trite, the judge gave himself no corresponding self-direction and found, at [14] and [15], that the appellant 'has not provided evidence to show that she did take the test' and that he was 'not persuaded that she did not cheat in the test'. Those findings, and the self-direction which the judge did give himself at [7] (that the appellant 'bears the burden of proof' and 'must satisfy this burden on a balance of probabilities') leads us to conclude that the judge misdirected himself in law in this fundamental respect. In the circumstances, we do not propose to consider the remaining allegation in ground two in any detail. It suffices to note that the complaint is that the judge overlooked evidence which might legitimately have militated in favour of a conclusion that the appellant had not cheated in her TOEIC test, including evidence of her competence in the English language at the time that she is said to have taken the test. Unfortunately, it is quite clear that the judge did fail to consider that evidence.

13. Ground three focuses on the inadequacy of the judge's article 8 ECHR assessment. It is submitted that the judge failed to come to grips with the situation of the family in the UK and to undertake any reasoned assessment of whether it would be proportionate for the respondent to remove the appellant whilst her husband's trafficking and protection claims were outstanding. That complaint is also made out; the judge's Article 8 ECHR assessment makes reference to the appellant's husband having an outstanding asylum appeal at [16] but he failed to undertake any analysis of the reality of the family's situation in light of that fact.

Relief

14. We therefore accept that the decision of the FtT is vitiated by serious legal error and that no part of it can stand. Having announced that decision at the hearing, we considered with the advocates whether the appeal should be remitted to the FtT or retained in the Upper Tribunal. We invited submissions, firstly, on the progress in the appellant's husband's outstanding matters.

15. We were told that the appellant's husband's appeal had been dismissed by the FtT on 11 January 2022. An application for permission to appeal had been refused by the FtT on 4 February 2022. A renewed application had been made to the Upper Tribunal on 8 February 2022 and that application remained undecided. In the meantime, however, there had been a positive 'conclusive grounds' decision, accepting that the appellant's husband had been the victim of trafficking, on 15 February 2022. Mr Moriarty (who has also been instructed in the appellant's husband's appeal from the outset) indicated that he was not minded to amend the grounds of appeal to the Upper Tribunal in light of the conclusive grounds decision, as he could not immediately see how the latter bore on the correctness of the FtT's decision. He noted that the respondent would have to decide whether to grant the appellant's husband leave to remain in light of the conclusive grounds decision, however, and that further medical evidence might yet be provided to the Secretary of State in support of a submission that leave should be granted. He invited us to remit this appellant's appeal to the FtT for a de novo hearing.

16. We did not accept at the hearing that this was the appropriate course whilst the husband's application for permission to appeal remained undecided. As we stated to Mr Moriarty, part of the difficulty in this case was the fact that the two appeals were progressing separately through the appeals system, therefore creating an artificial situation in which the best interests of the children and the proportionality of the parents' removal was considered in a 'staggered' rather than a holistic fashion. It seemed to us that there was no sense whatsoever in the FtT being required to consider this appeal once again when the appellant's husband's situation is under consideration separately and elsewhere.

17. We therefore indicated at the hearing that we intended to ensure that the outcome in the appellant's husband's appeal was known before taking any further action in respect of this appeal. We intimated that Judge Blundell might himself take a decision on the husband's application for permission to appeal in order to avoid any further delay.

18. In the event, the appellant's husband's application for permission to appeal was allocated to a different Upper Tribunal Judge for consideration. The application was considered and refused by Judge Hanson on 4 April 2022. The appellant's husband has therefore exhausted his appeal rights. He may be removed from the United Kingdom at the same time as the appellant and her children and what remains for decision in this appeal is the lawfulness and proportionality of that course, unencumbered by the complication which previously arose. Of course, he might ultimately be granted leave to remain as a victim of trafficking but that is in the hands of the respondent, who can properly be expected to reach a decision by the time this appeal returns for a further hearing.

19. The complication caused by the husband's appeal having been resolved, we return to the question of the relief which is appropriate for this appellant. Mr Moriarty invited us to remit the appeal. That was also the course of action suggested by the respondent in her rule 24 response. In light of the scope of the hearing, and the fact that no part

of the FtT's assessment can stand, we accept that remittal is the proper course of action in this appeal. We will therefore direct that the appeal be remitted to the FtT for rehearing de novo, before a judge other than Judge Abebrese.

Notice of Decision

The decision of the FtT is set aside in full. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge Abebrese.

Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

We have renewed the order made by the FtT in this respect. We note, however, that this is not a protection appeal and that the FtT gave no reasons for ordering anonymity. The Designated Judge who considered the appellant's husband's appeal also made no anonymity direction. Considering the presumption in favour of open justice, it will be appropriate for the FtT on remittal to invite submissions on anonymity.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2022