



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003531
UI-2022-003532
UI-2022-003533

First-tier Tribunal No: PA/04162/2020
PA/04174/2020
PA/04181/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

S H
M H B H
S A H
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik KC, instructed by Sony Sadaf Haroon, Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 25 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants and any member of their family, are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellants or members of their family, likely to lead members of the public to identify the appellants or members of their family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The first appellant is the mother of the second and third appellants. Because the claims are from a family group and based on the same factual matrix, the appeals have been combined throughout the proceedings.
2. We are asked to decide whether the decision of First-tier Tribunal Judges Moon and O’Keefe (the panel), issued on 21 April 2022, contains legal error, and if so, what steps should be taken to remedy such error. Our answer to this, as we announced at the end of the hearing, is that the decision of the First-tier Tribunal contains legal error such that we set aside that decision and remit the appeal to be decided afresh before a panel that does not include the First-tier Tribunal judges who have decided this appeal previously.
3. Of course, it is not enough simply to give our answer, and we set out our reasons in this decision. We start by listing the key events in the proceedings, which will help those reading this decision understand our conclusion that we have no option but to remit the appeal to be heard afresh in the First-tier Tribunal.
 - (a) The appellants claimed asylum from Bangladesh on 21 December 2018.
 - (b) The respondent refused each claim on 27 July 2020.
 - (c) The appeals were received by the First-tier Tribunal on 10 August 2020.
 - (d) First-tier Tribunal Judge Karbani heard the appeals on 12 April 2021 and dismissed them in a decision issued 29 April 2021.
 - (e) The appellants sought permission to appeal, which was granted by First-tier Tribunal Judge Saffer on 15 June 2021.
 - (f) Upper Tribunal Judge Gill heard that application on 30 November 2021 and in a decision issued on 22 December 2021 decided that Judge Karbani’s decision contained legal errors such that the decision should be set aside. Judge Gill remitted the appeal to be heard afresh in the First-tier Tribunal.
 - (g) The remitted appeal was heard by Judges Moon and O’Keefe on 29 March 2022 and dismissed in the decision issued on 21 April 2022.
 - (h) The appellants applied for permission to appeal, which was granted by First-tier Tribunal Judge Burnett on 20 May 2022.

4. We turn to the grounds of appeal that were settled by Mr Malik KC. They fall into three groups:
 - (a) The First-tier Tribunal's decision is procedurally unfair,
 - (b) The First-tier Tribunal Judges erred in failing to engage with the evidence given by the second and third appellants, and
 - (c) The First-tier Tribunal's findings of fact are internally inconsistent and perverse.
5. In the application for permission to appeal, Mr Malik reminds us of the guidance given in the head note to AM (fair hearing) Sudan [2015] UKUT 656 (IAC), which is relevant to our consideration of the first ground.

... If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date ...

Mr Malik provided other authorities for this approach, which reminds us it is a well-established principle.

6. Mr Tufan accepted there is merit in the first ground. The panel made adverse findings about the written evidence of Ms SH, the sister-in-law of the first appellant and Dr H, the country expert, despite the respondent not raising any concerns about the written evidence and without the panel raising its concerns with the parties. This was procedurally unfair because it denied the appellants the opportunity to address the perceived weaknesses.
7. Mr Tufan explained that the Rule 24 response includes a suggestion that the respondent's representative at the hearing had made submissions challenging the written evidence. Mr Tufan said he had reviewed the position and could not sustain that argument. He recognised that Mr Malik's submissions are recorded at [55] of the decision, which undermine the comments in the Rule 24 response about there being a challenge from the respondent to the expert report. He also accepted that the panel appears to have overlooked the oral evidence from the first appellant recorded at [45] regarding why her sister-in-law did not attend the hearing, when finding at [60] that there had been no evidence explaining her absence.
8. We find the failure of the panel to ventilate its concerns at the hearing is a procedural error that led to unfairness because if the appellants had been aware of the concerns, then they could have provided further evidence, and make representations to address the concerns.

9. Although our finding that there has been procedural unfairness is sufficient for us to set aside the decision and remit it for fresh determination, it is appropriate to comment briefly on the second and third grounds.
10. Administrative difficulties in the First-tier and Upper Tribunals mean that we do not have the witness statements of the second and third appellants before us. What we can say is that where a witness statement stands as evidence in chief, as here, then the First-tier Tribunal must have regard to that evidence and not reject it out of hand because no oral evidence was given. We have sufficient information from the representatives, however, that the second and third appellants provided detailed witness statements for the hearing before the panel, which were to stand as evidence in chief, to find that the panel gave inadequate reasons for giving little weight to the witness statements such that ground 2 had merit
11. Mr Tufan accepted there is some merit in ground 3 although he did not go so far as to concede it in full. Whilst we accept the force of Mr Malik's allegation of perversity, we recall there is a high threshold to establish such irrationality, and although we agree that the panel appears to be confused about the facts, and about what it accepted and rejected, such confusion is not sufficient of itself to establish perversity.
12. We find the confused nature of the panel's findings to be legal error because there is a lack of clear and cogent reasoning to sustain the findings made. This is accepted by Mr Tufan, and we agree, particularly as regards there being no media reports at all of the first appellant's husband going into hiding as opposed to being "disappeared" by the authorities. We therefore saw merit in part of ground 3.
13. We return to the chronology. We have seriously considered that because of the history of these proceedings, the decision should be remade in the Upper Tribunal. Although both parties seek a final resolution to the appeal, both representatives accepted that it would not be fair to keep the appeal in the Upper Tribunal given the procedural unfairness identified and because of the breadth of the issues that have to be re-decided.
14. We acknowledge the dissatisfaction this will bring to the parties, particularly the appellants who have already nearly spent two and a half years pursuing their appeals. No doubt the First-tier Tribunal will have regard to the overriding objective to ensure that any delay is limited to what is necessary in the interests of justice.

NOTICE OF DECISION

15. Having regard to section 12 of the Tribunals, Courts and Enforcement Act 2007:

- (a) We set aside the decision of the First-tier Tribunal issued on 21 April 2022,
- (b) We remit the appeals to the First-tier Tribunal for reconsideration,
- (c) We direct that the members of the First-tier Tribunal who are chosen to reconsider the appeals are not to be the same as those who made the decision that has been set aside, who were Judges Moon and O'Keefe,
- (d) We further direct that Judge Karbani is not to be chosen to reconsider the appeals, and
- (e) We direct that no findings are preserved from the decision we have set aside and that the appeals should be heard afresh in the First-tier Tribunal.

Judge John McCarthy

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 February 2023