



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: AA/11316/2014
AA/00114/2015

THE IMMIGRATION ACTS

Heard at: Birmingham
On 14th March 2016

Decision and Reasons Promulgated
On 25th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR DAUD OMARKHAIL
MR JAVED OMARKHAIL
NO ANONYMITY DIRECTIONS MADE

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Pipe, counsel (instructed by Guildhall Solicitors)
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are brothers and nationals of Afghanistan.
2. The first appellant was born on 25 December 1996. He entered the UK clandestinely on 9 September 2009 and claimed asylum on 10 September 2009. His application was refused but he was granted discretionary leave until 22 April 2013. A further application made on 17 April 2013 was refused on 4 December 2014 and

a decision was made to remove him pursuant to s.47 of the Immigration, Asylum and Nationality Act 2006.

3. The second appellant was born on 15 June 1995. He came to the UK with the first appellant and applied for asylum. His application was refused on 10 March 2010 but he was granted discretionary leave until 15 December 2012. His application for further leave to remain dated 13 December 2012 was refused on 16 December 2014 and a decision was made to remove him under s.47 of the 2006 Act.
4. First-tier Tribunal Judge Asjad dismissed their appeals “in their entirety” in a decision promulgated on 11 March 2015. She found that they are economic migrants, who had been sent to the UK to join their brother. She found their accounts to be fabricated. There was no basis to the asylum claim [24].
5. She considered Article 8 within the Immigration Rules, namely Appendix FM. The second appellant, Javed, entered into an Islamic marriage with Ms Z Bibi on 24 January 2015. Ms Bibi was herself born in Afghanistan and came to the UK when she was 13. She is now 20 years old. That marriage is not recognised under UK law. She found that the relationship was not a genuine and subsisting one. It was entered into solely for the purpose of securing his immigration status in the UK [32].
6. She refused both their appeals under Appendix FM [34].
7. With regard to their claim under paragraph 276ADE of the Immigration Rules, she did not find that the appellants would face significant obstacles to their reintegration and accordingly found that paragraph 276ADE(vi) was not met [36] and [37].
8. Nor did she find that there are any arguable grounds for granting leave outside the rules and did not propose to consider Article 8 on that basis [39].
9. On 10 April 2015, First-tier Tribunal Judge Nicholson granted the appellants permission to appeal. Ground 22 contended that the Judge erred in failing to consider Article 8 outside the rules. He found that it was arguable that as the relevant rules did not form a complete code, an Article 8 assessment outside the rules should have been made. As it could not be said that an arguable error could have no material bearing on the outcome of the appeal, permission was granted on that ground. He did not refuse permission on the remaining grounds, but stated that “most have no discernible merit.”
10. At the outset of the hearing, Mr Mills noted that the appellants had come to the UK as minors and had lived for a number of years in their brother's household. He

stated that the Judge had not properly addressed their case in the light of their ties in the UK. Whether family life continues in the UK as dependants of their brother had to be addressed. He stated that in the circumstances, the Judge erred in failing to consider the Article 8 claim outside the rules.

11. Mr Mills accordingly accepted that the Article 8 decision should be set aside and remitted to the First-tier Tribunal for a fresh hearing.
12. Mr Pipe adopted the grounds of appeal prepared by counsel who represented the appellants at the First-tier hearing. He submitted that the nature of the relationships needed to be considered by having regard to the number of brothers in the UK. Moreover, at [32] there had been no reference to the second appellant at all. The evidence that he produced was not even recorded.
13. He submitted that the Judge erred in law with regard to their asylum appeals. The determination was at times incoherent in places. The findings were not entirely clear to the reader and were inadequately reasoned. They were unclear or incomprehensible. Accordingly, the Judge did not consider the appeal with the most anxious scrutiny.
14. At [11] the Judge found that the appellants belonged to a family totalling six brothers, three of whom are resident in the UK having been granted refugee status. A sixth brother was deported to Afghanistan. That finding is factually incorrect as all four brothers of the appellants are settled in the UK and all obtained status here through discretionary leave to remain. None was granted asylum. The sixth brother whom the Judge recorded as having been deported to Afghanistan was in fact Mr Abdul Latif, who gave evidence in the case and who had in the past removed from the UK but is now settled here.
15. He submitted that the Judge's comments at [24] that she found Abdul Latif to have inadvertently stated the real reason for the appellants' coming to the UK, namely, to complete the family unit and that it is their intention now for their parents to join them as well, was an error. The Judge misconstrued or misunderstood the evidence given by him. He was giving evidence regarding the appellants' family life having been established in the UK though they had arrived here as minors who lived with Mr Latif. This was set out at [16].
16. The Judge failed to deal with the relevant issues she was asked to determine. There was no evaluation of the interview questions or the manner in which the screening and full asylum interviews were conducted. It was evident that the interviewing officer placed undue pressure on them. There was no proper reasoning as to why the submissions made were rejected. By way of example, Mr Pipe referred to questions 41 and 42 of the second appellant's interview. It is apparent from these

questions that the interviewer was stating in effect that he did not believe the appellant's account that his father was a commander in the army.

17. He questioned whether the Judge applied the correct lower standard of proof. At paragraph 11 of the grounds, it is contended that the Judge materially erred by taking a speculative and negative approach towards their credibility without properly considering or assessing all aspects of their claim in the context of their age at the time of the interviews. She did not apply the benefit of the doubt more liberally in view of their age at the date of the interviews.
18. With regard to [23] Mr Pipe noted that the Judge found that it was difficult to accept why at the time the Afghan army was supported by NATO and non-NATO troops, it is alleged that the appellants' father allowed Taliban members to frequent his home for five or six months without doing anything about it. It was not credible that a high ranking officer in the Army with soldiers under his control would feel powerless to do anything.
19. He contended that the Judge erred by reviewing this evidence from the standpoint of her own environment and not of that of a country where persecution, harassment, torture and ill treatment are endemic.
20. He submitted in reliance on paragraph 14 of the grounds, that the Judge did not indicate with clarity what evidence she accepted, what she rejected, what evidence she could not make up her mind on, and what evidence she regarded as irrelevant.
21. On behalf of the respondent, Mr Mills submitted with regard to the contention that there was a lack of anxious scrutiny, that whilst the Judge had at [11] made mistakes, they were not 'in and of themselves' material and do not show that anxious scrutiny had not been given.
22. The argument that the Judge's reasons were inadequate, unclear or incomprehensible and confusing is essentially a matter of form and not substance. Whilst it would have been best practice to set out the evidence as well as detailed reasons, there is nothing to suggest that the decision relating to asylum cannot stand.
23. He submitted that the Judge had made a clearly significant point at [16]. There she stated that if it was accepted as submitted, that the appellants were minors and were frightened and nervous and not used to the environment of questioning when they gave their interviews, it would then follow that any statement they gave in a more relaxed and less pressurised environment would by inference be more reliable than the interview conducted. It was on that basis that she proceeded to consider the

second statements made by the appellants in support of the applications for leave to remain.

24. Mr Mills submitted that the Judge did properly consider relevant matters, including the fact that they were minors and they had no representative at their interviews. There was however an adult present when it was conducted. This was their brother. The findings at [16] were reasonably clear and there was a proper basis upon which the Judge declined in effect to exclude the interview in evidence.
25. At [24] the Judge properly found that the reason why the first appellant struggled to give a proper account, and had repeatedly tried to do so, was because the circumstances are not true. The second appellant's inconsistencies are also as a result of his having been coached by his parents and brothers in his evidence. He was taken by surprise by the probing questions of the interviewing officer.
26. However, the Judge did not accept that the questioning was in any way harsh. His brother had acted as an appropriate adult and at the beginning of the interview this role was explained to him including the fact that the interview could be stopped if he thought his brother was becoming upset or distressed. The appellant only asked for a break once and that was when there was a major inconsistency that was put to him [24]. She accordingly found that the account of both appellants was fabricated.
27. Mr Mills submitted that if anything untoward had happened, the brother who was present would have complained. There is no suggestion from the interview record however that he did.
28. He submitted that the finding at [23] was significant. The core of the claim is that the father was a high ranking officer in the Army with soldiers under his control. The finding was that it is not credible that a high ranking officer in the army with soldiers under his control would have allowed Taliban members to frequent his home for five or six months without doing anything about it. The grounds in this regard contend that the Judge evaluated this evidence from the point of view of a person with a British cultural context. However, the reasons given by the Judge would be equally applicable in the context of Afghanistan. There is no latent cultural bias that has been used. This was not plausible in any context.
29. It is in that context that the Judge went on at [24] to make a finding that the appellants are economic migrants. If viewed in isolation it would constitute a misdirection. However, this has to be assessed with regard to the earlier finding which rejected the core claim of the appellants.
30. Although the Judge's assessment and analysis might have been better structured, it can be discerned why the Judge came to her decision and it should be upheld.

31. In reply, Mr Pipe submitted that cumulatively, the failure to give effect to the best practice adds up. There was nothing in the judgement about the ongoing strength of the Taliban.

Assessment

32. I have referred to the factual errors made by the Judge. I have also considered the contention that the decision was inadequately reasoned. The effect of the submissions is that the Judge failed to demonstrate that she had applied the most anxious scrutiny to evaluating the evidence of the appellants.
33. The fact that the Judge wrongly recorded Mr Abdul Latif as having been deported to Afghanistan even though he was in the past removed but is now settled here and gave evidence was, as acknowledged by Mr Mills, a mistake.
34. However, I accept his submission that in and of itself this did not constitute a material misdirection in the circumstances. The Judge had regard to his evidence.
35. It is contended that the Judge failed to evaluate the probity of interview questions which is said to reveal that the interviewing officer placed undue pressure on the appellants. Nor was there any proper reasoning as to why the Judge rejected the submissions made. It is asserted that there was no proper evaluation of the interview questions which were drawn to her attention.
36. In that respect, the Judge did not accept that the questioning was harsh in any way. The brother attended the interviews as an appropriate adult. His role had been explained to him. He was informed that the interview could be stopped if he thought his brother was becoming upset or distressed.
37. At [16] the Judge again refers to the closing submissions regarding the manner in which the screening and full asylum interviews were conducted. She found that even if the submission that they were frightened, nervous and not used to the environment and questioning, were accepted, it follows that any statement that they gave in a more relaxed and less pressurised environment would be more reliable. It was upon that basis that she analysed the statements of the appellants including their second statement as well as the first appellant's third statement.
38. It was on that basis that she ultimately found it difficult to accept why, if their father was a high ranking officer in the army with soldiers under his control, he would feel powerless to do anything with regard to the Taliban whom he allowed to frequent his home for five or six months [23]. That is a finding which is supported by the evidence including the background identified by the Judge.

39. The finding that the appellants are economic migrants followed her earlier finding that she did not accept that their claim about their father was true in the light of the objective evidence. She did not accept that they were visited at their home by Taliban members for the same reason [23].
40. She did not find with regard to risk on return, that even if it is accepted that their father did leave the army without resigning, this would lead to their persecution [29]. That was not supported by the objective evidence.
41. Although, as submitted by Mr Mills the structure of the decision might have been more coherent, the Judge has given sustainable reasons for dismissing the asylum appeals.
42. I accordingly find that the decision of the First-tier Tribunal Judge in respect of the appellants' asylum claims did not involve the making of any material error on a point of law.
43. With regard to the Article 8 claim however, I accept Mr Mills' assertion that the Judge should in the circumstances have found that there were arguable grounds for granting leave outside the rules. The fact that she did not proceed to consider Article 8 outside the rules constitutes a material error given that the relevant rules did not form a complete code.
44. The parties agreed that if that contention were upheld, this is an appropriate case to be remitted to the First-tier Tribunal for a fresh decision to be made. I accept that this is an appropriate case to be remitted.

Notice of decisions

The decision of the First tier Tribunal not to consider the appellants' Article 8 claims outside the rules involved the making of an error on a point of law. To that extent their appeals are allowed.

The decision is set aside and their Article 8 claims outside the Rules will be re-made at Birmingham, by another Judge.

No anonymity directions are made.

Signed

Date 19 April 2016

Deputy Upper Tribunal Judge Mailer