

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

**Appeal Number:
RP/00079/2016
RP/00080/2016**



RP/00081/2016

RP/00082/2016

THE IMMIGRATION ACTS

Heard at Field House

On 30 June 2017

**Decision & Reasons
Promulgated
On 4 July 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

A A

A A

A V

M W

(ANONYMITY DIRECTIONS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mrs T White, Counsel instructed by Adam Bernard
solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity order was made by the First-tier Tribunal as the case involves minor Appellants. It is therefore appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellants 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

Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The First Appellant appeals against a decision of First-Tier Tribunal Judge Callow promulgated on 13 February 2017 (“the Decision”) dismissing the First Appellant’s appeal against the Secretary of State’s decision dated 31 March 2016 revoking her refugee status. By [2] of the Decision, the Judge found that there were no valid appeals by the Second to Fourth Appellants who are the First Appellant’s children and who are unaffected by the Respondent’s decision to revoke their mother’s refugee status. There is no challenge to that part of the Decision. Accordingly, the remainder of this decision focusses on the position of the First Appellant only (hereafter referred to as “the Appellant”).
2. The Appellant is a national of Pakistan. Her identity is disputed by the Respondent and it is that fact which led to the Respondent’s decision and lies at the heart of her appeal. Having arrived, she says, in November 2006, the First Appellant claimed asylum as she said that she had suffered domestic violence at the hands of her husband in Pakistan. She was recognised as a refugee following a successful appeal and was granted leave to remain on 23 October 2009 expiring on 22 October 2014.
3. The Respondent’s officials carried out an enforcement visit in February 2010. The Appellant produced an ARC card showing that she had been granted leave as a refugee. However, the officials searched her property and found a Pakistani passport and identity card in the name of S M, also a Pakistani national with the same address as the Appellant gave for her residence in Pakistan. The documents bore the Appellant’s photograph. According to the passport, it was used to gain entry to the UK as a family visitor on 8 April 2006 (with a visa granted in February 2006), at a time when the Appellant says that she was still in Pakistan and suffering harm from her husband.
4. The Appellant protested (and continues to assert) that the documents do not belong to her and must have been used by the agent to facilitate her entry. She claims that she found the contentious passport in her suitcase some months after claiming asylum but did not mention it as she was afraid. It is her case that her photograph was placed in the documents improperly by tampering and that the passport and ID card do not belong to her.

5. As a result of the discoveries, the Respondent gave notice of intention to revoke the Appellant's refugee status on 8 June 2010 but then decided in May 2012 to take no further action. However, according to the Respondent, the documents have since then been examined by the National Document Fraud Unit ("NDFU") and have been found to be genuine documents with the inference that the passport was genuinely issued to the Appellant and that this is her true identity. That would further undermine her asylum claim since, at the time when she claims to have been in Pakistan suffering harm from her husband, she was in fact in the UK as a visitor.

The First-tier Tribunal Decision

6. At the hearing before the Judge, the Respondent failed to produce the NDFU report, despite having been ordered to do so. The Respondent had written prior to the hearing to indicate that "there is no DVR in this case." That led to the following recorded exchange at the start of the hearing under the heading "Withdrawal of the appeal":-

"[7] At the outset Ms Burrell, noting that the respondent had not complied with the PHR direction of 10 October 2016 to file a Document Verification Report, informed the Tribunal that the respondent was not in a position to proceed with the hearing of the appeal. Accordingly she had been instructed to withdraw the decision under appeal. It was anticipated that the respondent would reconsider the decision. In reply, making mention of some of the history recited above, Mr Richardson submitted that as there was no 'good reason' for the withdrawal, the appeal should not be treated as withdrawn. In the event of the appeal proceeding to be heard the appellant would not be called to give evidence."

7. Having directed himself as to Rule 17 of The Tribunal (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, the Judge ruled as follows:-

"[10] The right to make a decision clearly lies within the exclusive domain of the respondent. The same cannot be said of the withdrawal of a decision under appeal in the absence of 'good reason'. In my opinion no good reasons have been advanced. It is clear that the respondent must not use the withdrawal power as a tactical exercise in instances where she cannot produce evidence relied on in arriving at her decision. She must only use it if she is genuinely of the view that she might change her mind. It would be a wrongful exercise, and unfair to the appellant, if she were simply to use this power because she wanted more time to locate the NDFU report or to obtain another one wherein she has no intention of changing her mind: see and compare *Glushkov (2008) EWHC 2290*. A decision should only be withdrawn where it is clear the decision needs to be reconsidered, and there is a realistic prospect that the decision outcome would be different. In the present appeal there is no need to reconsider the decision of 31 March 2016 wherein there is no prospect that the result will be different."

8. Following that ruling, the Judge went on to consider the appeal substantively. He directed himself that the burden of showing that refugee status should be revoked lay with the Respondent ([14]). He left out of account the NDFU report ([16]). However, he also noted that there was no dispute that the contentious passport had been found at the Appellant's residence and bore her photograph ([13]). As noted above, the Appellant's representative did not call her to give evidence. The Judge therefore considered the case including her evidence by reference to her statement at [17] of the Decision as follows:-

"[17] The uncontroverted evidence is that the appellant at the time of the enforcement visit on 19 February 2010, some three years after her claimed arrival in the UK on 1 November 2006, was found in possession of the passport and ID card of [S M] and who has accepted that it is her photograph in the contentious passport. It is the appellant's evidence that after entering the UK she found the passport in her luggage. It must have been, for unexplained reasons, put in her luggage at the airport by the agent who assisted her to gain entry into the UK. If it was not her passport as with the ID card no explanation has been given as to why she retained these documents if they were not hers. In all of her protestations since her former solicitor's letter of 23 June 2010 she has not raised the possibility that her passport has been tampered with, but has repeatedly sought to identify herself as [A A]. As to being [A A] it could reasonably have been expected of her to obtain and produce her Pakistani birth certificate, ID card, marriage certificate or any other document issued in Pakistan describing her as [A A] born on 17 April 1980. Her failure to do so in the context of her claim counts against her. As does the evidence that when an application was made in Pakistan for the issue of visa in 2006 the same address as that on the passport of [S M] was used and which was supported by the appellant's photograph. It is inconceivable that an agent would obtain a passport in 2001 when it was only in 2006 that the appellant was a victim of persecution at the hands of her husband. Furthermore it is highly improbable that the agent gave the passport to the appellant by putting it in her luggage without her knowledge. In the event it has not been explained by the appellant why she retained not only the passport of [S M], but also [S M]'s ID card if her true identity is [M A] (sic). If she is [M A] (sic) she would have long ago destroyed or thrown these incriminating documents away. She would not have retained them for over three years subsequent to her entry into the UK if they were not her property. Of greater weight is that the agent who facilitated her entry into the UK would have retained the documents if they had been unlawfully obtained. They were not according to the appellant her documents and which in the circumstances of the appellant's explanation as to how and when she gained entry into the UK would have been retained by the agent. To this extent they were his property and which in the circumstances of the appellant's claimed entry into the UK would be of no further interest to the appellant. She was not [S M]. As the documents had served their purpose they would, in the ordinary course of events, have been retained by the agent. As she was [M A] (sic) they were of no further interest to the appellant. False passports and ID cards are the tools of trade of agents facilitating the entry of illegal immigrants into the UK. Had the documents not been those of the appellant he would have retained them for future use."

9. Having reasoned thus, the Judge analysed the legal position as follows:-
“[18] In the foregoing circumstances the spotlight switches to the appellant to discharge the evidential burden of raising an innocent explanation, namely an account satisfying the minimum level of plausibility. The appellant’s circumstances described above do not raise an explanation worthy of any belief. Her explanation, despite the lack of a NDFU/DVR report, is implausible. The evidence is such that the conclusion is reached on a balance of probabilities the appellant lawfully arrived in the UK as [S M] on 6 April 2006 for a six month family visit, but overstayed leading to her false asylum claim made on 3 November 2006 founded on allegations of domestic violence and threats of death as the member of a particular social group. The particulars of her asylum claim were such that the events complained of in Pakistan occurred when she was already in the UK. Her claim was founded on false circumstances. The respondent’s failure to produce the NDFU/DVR report has not proved fatal to her case.
[19] It therefore follows that the Respondent has established on the balance of probabilities that the appellant’s *prima facie* innocent explanation falls to be rejected. The appellant’s application to be recognised as a refugee in 2006 was tainted by deception. Accordingly her appeal addressing revocation of her refugee status fails. Based on the findings made the inescapable conclusion is that the appellant is [S M] and not [A A].”

Grounds and Submissions

10. The Appellant appeals the Decision on three grounds. First, she says that the Judge failed to properly direct himself as to the implications for the Respondent’s case of being unable to produce the NDFU report. The Appellant says that this was at the heart of the Respondent’s decision and the Respondent herself recognised at the hearing that the effect of not being able to produce that report was that she was unable to proceed. She says that the Judge failed to recognise that in order to meet the evidential burden placed on her, the Respondent needed to make out her case that the passport is a genuine one and since she could not do so the Judge should have found that she had not discharged her evidential burden and should have allowed the appeal.
11. The second ground is a similar argument in relation to the evidence adduced by the Appellant. It starts with an assertion that there was no evidential burden on the Appellant as the Respondent could not satisfy the evidential burden on her and is to that extent simply a repetition of ground one. It continues however with a submission that the Appellant did not accept that the passport was genuine and that the use of the Appellant’s photograph and address in Pakistan was equally suggestive of a forgery. The Appellant also submits that the Judge’s finding that the agent would have taken the passport back if it was forged is speculative.

12. The third ground takes issue with the basis on which the Judge continued to decide the case substantively, the Respondent having effectively conceded that she could not make out her case without the NDFU report. To that extent, this ground is also a repetition of the first ground. The Appellant also asserts here that the Judge went beyond the Respondent's case when deciding that the Respondent had met the evidential burden on her and relied on reasons which were not relied upon by the Respondent without the Appellant having the opportunity to address those reasons.
13. Permission to appeal was granted by First-tier Tribunal Judge Grant-Huchison on 18 May 2017 in the following terms (so far as relevant):-
"[2] It is arguable that the Judge has misdirected himself in not permitting the Respondent to withdraw the decision as requested on her behalf by the Home Office Presenting Officer on the day of the hearing because the Respondent had failed to discharge the initial evidential burden by failing to produce a claimed report from the National Document Fraud Unit which had led to the decision to revoke the first Appellant's status in 2016. As such this could have made a material difference to the outcome or the fairness of the proceedings."
14. By a Rule 24 statement dated 2 June 2017, the Respondent partially conceded the error of law in the following terms (so far as material):-
"[2] The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the tribunal had jurisdiction to continue with the appeal given the Respondent had withdrawn the basis of the appeal namely the decision letters and notices."
15. At the outset of the hearing, Ms White who appeared for the Appellant indicated that she wished to withdraw the appeal. She said that, having discussed the matter with Mr Melvin, she was reassured that the Respondent was acting in good faith in withdrawing the decision under appeal and offering to reconsider and that this was not a ploy to buy time to find the NDFU report. It was though clear from her submission that the Appellant would only withdraw the appeal if the Decision were set aside. I therefore heard from her in that regard.

Error of Law Decision and Reasons

16. I indicated at the end of the hearing that the Judge had erred in law particularly when considering the issue of the fairness of the proceedings below. Once the Judge indicated that he would not treat the appeal as withdrawn, the Appellant may have been misled into thinking that the Judge would simply allow the appeal. For that reason, the Appellant was not called to give evidence which may have affected her ability to properly defend the case. It was therefore incumbent on the Judge to put to the Appellant the points which he considered were

reasons why the Respondent's case continued to discharge the evidential burden notwithstanding the absence of the NDFU report. I indicated that I would provide my decision in writing which I now turn to do shortly.

17. First, although I consider it ill-behoves the Appellant to complain that the Judge did not simply allow the appeal to be withdrawn in circumstances where the Appellant's legal representative objected to that course, there is an error in the way in which the Judge approached this.
18. Rule 17 of the Procedure Rules provides as follows:-
"Withdrawal
17.-(1) A party may give notice of the withdrawal of their appeal -
(a) by providing to the Tribunal a written notice of withdrawal of the appeal; or
(b) orally at a hearing,
and in either case must specify the reasons for that withdrawal.
(2) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision..."
19. As Rule 17(2) makes clear, the usual course where the Respondent withdraws the decision under challenge is that the Tribunal should generally treat the appeal as withdrawn unless there is good reason not to do so. In this case, the Judge misdirected himself in two ways in his approach. The first is that he appears to have thought that what he was considering was whether the Respondent should be allowed to withdraw her decision (see in particular second sentence of [10] cited at [7] above). The Rule is concerned with whether the Judge should treat the appeal as withdrawn notwithstanding the Respondent's withdrawal of the decision under challenge not whether he should permit the Respondent to withdraw her decision. Second, the Judge then appears to have looked for good reason to allow the decision to be withdrawn. However, that also reverses the presumption inherent in Rule 17(2). Whilst it may well have been open to the Judge to refuse to treat the appeal as withdrawn, applying the test whether there was good reason to proceed notwithstanding the withdrawal of the decision under challenge, for the foregoing reasons I am persuaded that he erred in his approach to that issue.
20. The second reason I find an error of law is that the Appellant's representative appears to have read the Respondent's withdrawal of the decision as being a concession that she could not succeed and therefore appears to have presumed that the natural course would be for the appeal to be allowed. I do not know precisely what was said to the Judge but what is recorded at [7] of the Decision does not read as

an express concession by the Respondent that she could not succeed in the absence of the NDFU report.

21. However, I am persuaded that there was an unfairness to the Appellant caused by the Judge's consideration of the evidence at [17] of the Decision. As I put to Ms White during the hearing, a Judge could still find the evidential burden to be met by the fact that the Appellant had in her possession a passport and ID card including her photograph with a different identity even if those documents were in fact forged. However, as Ms White pointed out, that was not the basis of the Respondent's decision. Accordingly, the Judge raised those reasons and it appears from what is said that those points were not put to the Appellant or her legal representative. There is therefore an unfairness in the proceedings.
22. For those reasons, the Decision does disclose errors of law in relation to the determination of the First Appellant's appeal and I set the Decision aside (save in relation to [2] of the Decision which deals with the appeals of the Second to Fourth Appellants).

Withdrawal

23. The Appellant having indicated via Ms White that, provided the Decision were set aside, she then wished to withdraw the appeal and the Respondent having indicated by her Rule 24 statement that the Judge erred by not treating the appeal as withdrawn at first instance, I consent to the Appellant's withdrawal of her appeal.

DECISION

The appeals of the Second and Fourth Appellants were found not to be valid by [2] of the decision of First-tier Tribunal Judge Callow. There having been no challenge to that part of the decision, the decision that they have no valid appeals is upheld. I am satisfied that the Decision (other than paragraph [2]) contains material errors of law. The decision of First-tier Tribunal Judge Callow promulgated on 13 February 2017 is set aside. The First Appellant having indicated via her legal representative orally at the hearing before me that she wished to withdraw her appeal thereafter (in light of the Respondent's withdrawal of the decision under challenge) and the Respondent not objecting to that course, I consent to the First Appellant's withdrawal of her appeal. This amounts to a final disposal of her appeal.

Signed



Dated: 3 July 2017

Upper Tribunal Judge Smith