Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11744/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 March 2019	**On 12 April 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

SHC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Parkes, promulgated on 9 January 2019. Permission to appeal was granted by First-tier Tribunal Judge Keane on 12 February 2019.

Anonymity

2. An anonymity direction was made previously and is reiterated below.

Background

3. The appellant's husband entered the United Kingdom using a British passport in the identity of a deceased person. The appellant and her son (S), now aged 9, were granted leave to enter the United Kingdom as a partner and minor child of the person named in her husband's fraudulently obtained passport and entered the United Kingdom on 14 December 2011. The appellant and (S) were granted further leave to remain until 1 October 2016. The appellant gave birth to a daughter (R) in the United Kingdom in 2012 who is now aged 6. R was issued a British passport in 2014, however this was revoked in 2016. On 16 September 2016, the appellant's husband was convicted of a series of offences involving the use of false documents and sentenced to consecutive prison sentences amounting to 53 months, in total. On 19 October 2016, the appellant's husband was served with a decision to make a deportation order against him under section 32(5) of the UK Borders Act 2007.

4. The appellant applied for further leave to remain under the 10-year family life route 24 August 2017 which remains outstanding. In addition, a human rights claim was raised in response to the Secretary of State's decision to make a deportation order against her on 8 January 2018.

5. The Secretary of State, in the decision letter of 28 January 2018, relied on paragraph 363(ii) of the Immigration Rules, considering it was appropriate to deport the appellant as a family member of a person ordered to be deported. It was emphasised that the appellant might relocate to Bangladesh voluntarily. Consideration was given to the appellant's Article 8 claim, based on the presence of her husband and children in the United Kingdom as well as her own private life, established since her arrival in 2011. In short, it was noted that the requirements of paragraph 399(a) were not met because neither child had lived in the United Kingdom for at least 7 years and furthermore, it was not considered harsh for the appellant's children, who were considered to also be Bangladeshi nationals, to accompany her and her husband to Bangladesh. Nor did the appellant meet the requirements of paragraph 399A given her short and unlawful residence in the United Kingdom. Consideration was given to whether there were any exceptional circumstances as the appellant had indicated that S had a health condition. The outstanding application for further leave to remain was refused under paragraph 322(1B) of the Rules because the appellant was subject to a deportation order as well as under S-LTR 1.6 owing to her association with her husband. Separate decisions were made, refusing the human rights claims of the appellant's husband and each child.

<u>The decision of the First-tier Tribunal</u>

6. Prior to the appeal hearing, Kalam Solicitors wrote to the First-tier Tribunal on 17 July 2108, in the following terms, "*Appellant does not wish her appeal to be joined with her husband's appeal. This is because she has been separated from her husband since October 2016. She has no communication with her husband since that date. Appellant do not want her children to see their father for the best interest of her children's upbringing because of her husband's present circumstances*. "

7. The application to unlink the appellant's appeal from that of her husband was refused by First-tier Tribunal Judge M Robertson because the case papers indicated that the appellant had been visiting her husband in prison with the children throughout 2017.

8. At the hearing before the First-tier Tribunal, the appellant's appeal remained linked to that of her husband, which included an appeal against a refusal to recognise him as a refugee. There were no appeals in relation to the decisions to deport the children.

9. The judge's conclusions on the linked appeals are set out in a single decision. The judge found the asylum claim of the appellant's husband to lack credibility and did not therefore accept that he was of adverse interest to the Bangladeshi authorities. The judge rejected the appellant's claim that she was no longer in a relationship with her husband as a ruse designed to avoid deportation. By the time of the hearing, S had resided in the United Kingdom for 7 years, however the judge found that it was not unreasonable to expect him to leave the United Kingdom with his parents.

Permission to appeal

10. The appellant appealed however her husband did not. Firstly, it was argued that the judge was wrong to find that it did not affect the outcome of the appeal whether or not the appellant and her husband were in a genuine and subsisting relationship because if they were not, the deportation order against the appellant would cease to have effect.

11. Secondly, the judge was said to have erred in finding that the appellant remained in a genuine and subsisting relationship with her husband because the judge had taken into consideration the husband's demeanour, which was an irrelevant consideration. Furthermore, the judge had not considered the appellant's evidence that she visited her husband in prison for the sake of the children; that her husband had called her from the prison as opposed to the appellant calling her husband; that the judge engaged in speculation and that the appellant was not asked for an explanation as to the recent relationship breakdown.

12. Thirdly, the judge's findings as whether it was either unreasonable or unduly harsh for the children to leave the United Kingdom were said to be erroneous in a number of respects.

13. It was contended that the judge did not engage with the findings in EV (Philippines) [2014] EWCA Civ 874; that the appellant's case was not analogous to that of the claimant NS in KO (Nigeria) [2018] UKSC 53 because it was not the respondent's case that she had engaged in deception; that the judge considered parental conduct in his reasonableness assessment and imposed unduly stringent requirement in failing to recognise that it did not need to be shown that the children would be without support or unable to reintegrate in Bangladesh, MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC).

14. Permission to appeal was granted on the following basis;

"*a fair reading of the judge's decision arguably established that the judge did embark upon speculation at paragraph 46 of the decision and did engage in unjustified speculation if regard was had to paragraphs 49, 50 and 52 of the decision and the judge arguably took into account irrelevant considerations.*

Submissions

15. The appellant did not attend the hearing of her appeal on 20 March 2019 and nor was she represented.

16. An appellant's bundle was emailed to the Tribunal in advance of the hearing, which lacked a detailed index but consisted of several hundred pages. Having examined the documents therein, it transpired that there was nothing there which was not already present on the case file.

17. On 19 March 2019, Kalam Solicitors wrote to the Upper Tribunal in the following terms;

"We write to confirm that we are unable to instruct counsel to represent the above client at the hearing as the appellant is going (sic) extreme financial difficulties and could not arrange money for the hearing. The appellant has now instructed us to make a request to the Upper Tribunal to decide the appeal on papers on the file.

We are therefore requesting the Upper Tribunal Judge to decide this appeal in our absence on the basis of papers and in light of the grounds of appeal."

18. In view of the clear request from the appellant's solicitors, I decided to proceed with the hearing in the absence of the appellant and her representative.

19. I heard submissions from Ms Willocks-Briscoe which are summarised here. She confirmed that the appellant's husband had not appealed the dismissal of his appeal, but that removal action had been postponed pending the outcome of the appellant's appeal. The main argument of the appellant was summarised as that the judge should have accepted that the appellant and her husband were no longer in a relationship.

20. Regarding the first ground, Ms Willocks-Briscoe accepted that the respondent's guidance said that if an applicant no longer formed part of the family of a person subject to the Deportation Order, they would not be liable for deportation. However, while the judge indicated that it made no difference if the appellant and her husband were together or not, this error was immaterial because he found that the relationship was still subsisting.

21. On the second ground, it was said that the judge engaged in speculation at [49, 50 and 52]; that the appellant only visited her husband because of the children and that the judge was not entitled to consider other matters. Ms Willocks-Briscoe drew my attention to [47-48] of the decision where the judge referred to the evidence of telephone records and family visits

provided by the appellant's husband in his bundle. The evidence presented to the Tribunal by the appellant's husband was that he and the appellant were in a relationship.

22. Ms Willocks-Briscoe argued that the judge had not taken into account irrelevant considerations and on the contrary directed himself at [49-50] that his comments regarding the circumstances of the arranged marriage were to be disregarded. As to the demeanour issue, she argued that the judge was entitled at [51] to have regard to the husband's conduct on apparently learning that the relationship was over at the hearing.

23. Regarding the allegation that the judge had not asked the appellant for an explanation as to the relationship breakdown, Ms Willocks-Briscoe took me to her two witness statements which provided such an explanation. She argued that it was open for the judge to consider the appellant's explanation in the light of the evidence of visits and telephone records which went well into 2018, which were relied upon by the appellant's husband to show family life was continuing.

24. Ms Willocks-Briscoe contended that the findings of the judge were properly assessed, dealt with the evidence holistically and he was entitled to find that the marriage was still subsisting as well as that the appellant was attempting to distance herself from her husband as this was the only way the appeal could succeed.

25. As for the last ground, there had been no evidence before the judge about the likely circumstances in Bangladesh or why there would be difficulties for the children or why the parents could not protect their best interests. At [57], [58] and [62], the judge looked at the circumstances of the children and could not be criticised for failing to make findings on arguments or evidence not before him. Lastly, Ms Willocks-Briscoe argued that there was no reason why the appellant could not have attended the hearing in the absence of counsel and that the reality was that she is in a genuine and subsisting relationship with her husband.

26. At the end of the hearing, I announced that I found no material error of law in the decision of the First-tier Tribunal. My reasons are set out below.

Discussion

27. The first ground is unarguable. The grounds assert that the judge was wrong to state that the issue as to whether the appellant and her husband were or were not in a subsisting relationship did not affect the outcome of the appeal. This is a misreading of the judge's findings. When the paragraph is read as a whole it is obvious that the judge made no such finding. At [61], which was at the end of the decision, the judge was summarising the protection and human rights issues, saying as follows;

"*None of the family have any legal status in the UK. Whether the First and Second Appellants are still in a subsisting relationship or not does not affect the outcome.*"

28. The judge was correct in finding that the appellant had no leave to remain in the United Kingdom and that this would still be the case whether or not she was in a subsisting relationship with her husband. Even were the grounds correct in stating that an error had occurred, it would be immaterial because the judge considered the position of the relationship between the appellant at her husband in depth from [45-58] and firmly concluded at [60] that the relationship between the appellant and her husband remained genuine and subsisting.

29. I now address the second ground of appeal. In assessing whether the appellant's marriage was genuine and subsisting, it is argued that the judge took into account the demeanour of the appellant's husband, which was an irrelevant consideration. It was further argued that the judge failed to take into consideration the appellant's evidence as to the reason for the continued contact with her husband and for the claimed relationship breakdown and embarked on speculation.

30. The appeal of the appellant's husband was partially based on his family life with the appellant and their children. That relationship was accepted as genuine and subsisting by the respondent in the decision refusing the appellant's husband's challenge to the deportation order.

31. Recent authority on the issue of demeanour was given at [41] of SS (Sri Lanka) [2018] EWCA Civ 1391;

> "No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts. "

32. The appellant married her husband in August 2007 and lived with him and their two children until he was arrested in 2016. It is not in dispute that since then she has frequently visited her husband and accepted lengthy telephone calls from him and documentary evidence of this was contained in the bundle submitted by her husband in support of his family life in the United Kingdom. She has also sent money to her husband in prison. In her witness statement dated 8 January 2018, the appellant made no mention of her relationship with her husband having ended. However, her statement of 17 December 2018 says the following, "*I am eager for my husband to return home for the sake of my children so we can co-parent together to give our children the best start in life despite the*

circumstances. However I do not want any marital relationship with my husband because I still feel angry and hurt due to him being unfaithful about his immigration past."

33. At [46] the judge records that he was informed that it was only during cross-examination of the appellant's husband that the latter became aware that the appellant had ended their relationship. Therefore, the judge's comment that if it was the case that this was the first time he had heard of it, the appellant's husband was "*remarkably composed by the news that his married life had come to an end,*" must be seen in that context and with the proviso added by the judge of "*if that was so*." A fair reading of the judge's comments indicates that he does not wholly accept that the appellant's husband was unaware of the basis of her case. Furthermore at [51-53] the judge sets out why he does not accept that the marriage is over based on the appellant's conduct in continuing to visit, accept telephone calls and send money and her unsatisfactory explanation for the conduct. It is only after the judge concludes that "*their relationship remains genuine and subsisting*" that he mentioned that his findings were "*reinforced*" by the husband's demeanour. There is no indication that judge arrived at his conclusions on the state of the marriage based solely or even partially on her husband's apparent lack of distress regarding this issue. In any event, the appellant's most recent witness statement does not unequivocally state that the marriage is over.

34. There is no basis for finding that the judge failed to take into consideration the appellant's explanation for the visits to her husband as well as the telephone calls. That explanation was contained in her witness statement of 11 September 2018 at paragraph 6, which formed part of her evidence and which was referred to at [21][52] and [55] of the judge's decision. At [52], the judge sets out the appellant's evidence as to why she continued to visit, communicate with and send money to her husband and clearly states that he did not accept her explanation.

35. The judge was faced with conflicting evidence. The appellant was stating that her marriage was over whereas her husband was relying on his continuing family life. The judge resolved that conflict by concluding that the appellant had chosen to visit her husband and accept his calls in circumstances where she was not compelled to do so and furthermore that there was no need to send her husband money for food, given that he would be fed by the prison.

36. It is clear from a fair reading of the decision that the judge's findings regarding the state of the marriage were not based upon the demeanour of her husband alone but solely upon discrepancies in the evidence of the appellant and her husband as to the nature and subsistence of their relationship and the appellant's implausible explanation for her conduct.

37. The grounds assert that at [49] the judge engaged in speculation regarding his view that the appellant would have been aware of her husband's true identity given that they had a marriage arranged by their respective families.

38. There is no merit in this argument when one looks at [50] where the judge demonstrates that he did not attach weight to this matter in arriving at his conclusions. He said the following:

"This aspect is not an important point and can be disregarded as part of the overall consideration of the cases..."

39. It is further argued that the judge engaged in speculation at [52] in his assessment of whether the appellant's conduct in regularly visiting and speaking to her husband indicated that the marriage was subsisting. At [47-48] of the decision the judge summarised the evidence of regular visits and lengthy telephone calls between the appellant and her husband and was entitled to reject the appellant's claim that the marriage was over and conclude that the evidence of contact showed a subsisting marriage. It was not speculation, but common sense, for the judge to state that the appellant was not compelled to visit her husband in prison or accept his telephone calls and that there was no need to send him money for food.

40. The last ground, upon which permission was not granted, is not made out. The judge fully considered the circumstances of the appellant's children which included the extent of support available to the family unit in Bangladesh [57], as well as the stage of their education [54 & 58] and that the third appellant had resided in the United Kingdom for 7 years by the time of the appeal. The judge records that he was not informed of there being any circumstances out of the ordinary [62] which would outweigh the public interest in deportation. Indeed, the grounds identify no such circumstances.

41. The judge directed himself appropriately, having regard to the relevant case law including KO (Nigeria) [2018] UKSC 53. Indeed, at [18] of KO, the following is said;

"it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave."

42. The judge did not punish the children for the parents' behaviour. At [57], the judge took the appellant's case at its highest, accepting that she was unaware of her husband's use of deception including on her own behalf.

43. The judge did not err in stating that the parents were in the United Kingdom without leave and at [59] that there was no evidence to support a conclusion that it would not be reasonable to expect the eldest child to accompany his parents to Bangladesh.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

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

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

Signed Date 05 June 2019

Upper Tribunal Judge Kamara