The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/05000/2012
AA/05002/2012
AA/05003/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 5 March 2015	**On 10 June 2015**
Prepared on 28 May 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

A. R.
M. A.
K. K.
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Draycott, Counsel instructed by Paragon Law
For the Respondent: Mr Dewison, Home Office Presenting Officer

DECISION AND REASONS

1. The First and Third Appellants are husband and wife, and citizens of Pakistan and the Ukraine respectively. Their daughter, the Second Appellant has dual Pakistani and Ukrainian nationality, and she was born in the UK in August 2009.

2. The First and Third Appellants entered the UK illegally, and say that they did so in April 2009. They claimed asylum together on 29 June 2009. Their asylum application was refused on 3 May 2012, and in consequence decisions to remove all three Appellants from the UK were made.

3. The appeals against those decisions were first heard by the Tribunal on 17 July 2012, when they were dismissed in a decision promulgated on 12 August 2012. The Appellants appealed successfully to the Upper Tribunal, so that the decision of the First Tier Tribunal was set aside, and the appeals were remitted to the First Tier Tribunal for hearing afresh.

4. The appeals then came before Judge Fisher for hearing on 6 September 2013. The Appellants were represented by Mr Draycott (who has continued subsequently to represent them). The appeals had to be adjourned part heard for lack of court time. They were relisted on 14 January 2014, and they were then dismissed by way of decision promulgated on 27 January 2014.

5. Upper Tribunal Judge Pinkerton refused the Appellants permission to appeal that decision on 19 February 2014. At that stage the grounds had raised two challenges to the decision, and were relatively briefly expressed. The first challenge was to the procedural fairness of the appeal process. The delay between the date upon which oral evidence had first been heard, and the promulgation of the decision, was said to render that appeal process unfair. The second challenge was to the approach taken to the medical evidence concerning the mental health of the Third Appellant which was said to offer an explanation for the manner in which her evidence had been given, and to explain that she posed a real risk of suicide in the event of removal from the UK.

6. Undeterred the Appellants renewed their application for permission to appeal to the Upper Tribunal relying upon additional grounds. It was now asserted in addition;

    i) that the Judge had overlooked oral evidence given on 6 September 2013 by the Appellants,

    ii) that the Judge had overlooked oral evidence given on 6 September 2013 by a witness, Ms Z, and,

    iii) that the Judge had failed to approach the evidence “holistically”.

7. On 17 March 2014 it is said that the Appellants lodged amended grounds, which essentially amounted to a wholescale rewrite of the grounds originally lodged with the Upper Tribunal, and which in addition asserted that the Judge;

(i) had failed to have proper regard to the content of the expert report of Ms Mooen of 13 July 2012,

(ii) had failed to have proper regard to the content of the expert reports of Mr Chenciner of 9 July 2012, and 22 August 2013,

(iii) had failed to consider that an assault sustained by the First Appellant in Ukraine constituted past persecution, and had failed to make any finding that there were good reasons to consider that this persecution would not be repeated, and,

(iv) had overlooked or misunderstood the evidence of Dr Kumar in rejecting the suggestion that the Third Appellant's psychiatric condition was relevant to the manner in which she had given oral evidence, and in rejecting the submission that she posed a real risk of suicide.

8. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 26 March on the basis that it was arguable the Judge had overlooked evidence which was relevant to the credibility of the Appellants. Whilst it was considered that there was less merit in the other grounds, permission was granted in relation to them too.

9. The Respondent filed no Rule 24 Notice.

10. Thus the matter comes before me.

The amended grounds

11. The amended grounds of 17 March 2014 were not on the Tribunal file, and there is no reference to their numbered paragraphs within Judge Rintoul's decision, which raises at least the suspicion that they were not actually before him when he made his decision. Indeed it was only towards the end of the hearing before me when a reference was made to these amended grounds by Mr Draycott at the conclusion of his submissions that I became aware of their existence. Thus they did not constitute the core of his arguments, and at first sight had the appearance of the litany of forensic criticism deprecated in VHR (unmeritorious grounds) Jamaica [2014] UKUT 367. A copy was produced, and Mr Dewison was then able to formally accept that the Respondent had at some stage been served with the amended grounds.

12. In the circumstances, and after some discussion and reflection, the parties invited me to deal with the appeal on the basis that Judge Rintoul had granted permission upon the re-amended grounds of 17 March 2014, which I do.

The delay argument

13. It is common ground that Judge Fisher was placed in a difficult position on 6 September 2013, through no fault of his own. The Appellants had failed to identify at the CMR hearing, or subsequently, the likely length of the appeal hearing. Thus with the benefit of hindsight it is now obvious that wholly inadequate time was allocated to the appeals on 6 September 2013. When it became obvious that the hearing of the appeals could not be completed on that occasion, the Judge made arrangements that same day for the appeals to be relisted at the convenience of all parties. He then anticipated the appeals would be completed on 24 September 2013, and if they had been, then no complaint of delay could have arisen.

14. The Judge records in his decision simply that for a variety of reasons the anticipated hearing on 24 September 2013 could not take place. Again he records baldly that the appeals were then listed administratively for 13 November 2013 - a date when he was not in fact available, and so they had to be relisted once again. Although no explanation was offered for this either, and it is not clear what attempts were made to force the issue, Mr Draycott was said not to have been available during the month of December 2013. Thus the appeals were not listed until 14 January 2014.

15. The Appellants requested in writing on 30 December 2013 that the appeals be heard afresh in the light of the delay, which application was refused by the Judge in writing. The application was renewed on 8 January 2014, and it was refused again by the Judge in writing. The reasons given were then set out by the Judge in his decision [2], although they had of course already been communicated to the parties by the Tribunal as part of the decisions to refuse the requests.

16. Mr Draycott accepted before me that did not renew the application orally before the Judge on 14 January 2014. Whilst it was not suggested that the Judge did, or said, anything that was inappropriate on 14 January 2014, Mr Draycott explained that he felt that renewing the application once more would be a waste of time given that he would be doing so to the same Judge who had already refused the application twice. In my judgement Mr Draycott’s stance was an error of judgement. He should in fairness to the Judge, and to the Respondent, have made his position clear by renewing his application, however briefly, rather than simply waiting to see whether the Appellants were successful in their appeal. His application could for example very easily have been maintained throughout his submissions on the issues the Judge needed to determine, and the evidence that he prayed in aid upon those issues.

17. Despite his decision not to make such an application, Mr Draycott's argument is essentially that the Judge should not have proceeded with the hearing and then taken the decisions that he did. It is argued that the Judge should have taken the decision to start afresh of his own motion either at, or after the hearing on 14 January 2014 when preparing his decision. Mr Draycott argued that the Judge ought to have formed the view that in all the circumstances of this appeal fairness required him to take such a course.

18. The grounds, as drafted, rely heavily upon the principles set out in the decisions in Sambasivam v SSHD [1999] IAT RF 1999/0419/4 and Mario [1998] Imm AR 281.

19. Mr Draycott accepted before me that the chronology of this appeal was not similar to that which had faced the Courts in either of those appeals, but he prayed in aid the principles set out as being applicable to the situation faced by the Judge.

20. In Mario HHJ Pearl had referred to situations where there had been delays of 20 months, 8 months, and 5 months between the oral evidence being heard and the judgement being delivered, in which the trial judge had been censured by the Court of Appeal. He said this;

> "In an area such as asylum, where evidence requires anxious scrutiny, the Tribunal will usually remit a case to another adjudicator where the period between the hearing and the dictation of the determination is more than 3 months."

21. In Sambasivam the Court of Appeal considered that the decision in Mario was;

> "… no more and no less than a useful statement of guidance to practitioners upon the usual attitude and likely decision of the IAT in a case where an issue essential to the disposition of the claim for asylum depends upon a careful weighing of the credibility of the applicant and yet it appears that the delay between the hearing date and the preparation of the determination exceeds 3 months. In the absence of special or particular circumstances, that is plainly a useful and proper rule of thumb which, in the experience of the Tribunal, it is broadly just to apply, for the twin reasons that substantial delay between hearing and preparation of the determination renders the assessment of credibility issues unsafe, and that such a delay tends to undermine the loser's confidence in the correctness of the decision once delivered." [16]

22. In this case, the Appellants are correct to identify a passage of over four and a half months between the occasion upon which the Judge heard their oral evidence, and the date that he completed his decision and submitted it for promulgation; 6 September 2013 to 23 January 2014. However this was not an instance of simple delay in excess of three months. In the intervening period, albeit after over

four months had elapsed since the occasion upon which the oral evidence had been heard, there had been a further hearing on 14 January 2014.

23. It was obviously open to the Appellants at the hearing on 14 January 2014 to seek the Tribunal's permission to call any further evidence that had come to light in the intervening period. That was not done, and it is not suggested that it needed to be done.

24. It is accepted by the Appellants that Mr Draycott as their Counsel also had the opportunity at the hearing on 14 January 2014 to make whatever submissions he considered appropriate. Those could have included whatever references to the evidence (both oral and written, lay and expert) that he considered necessary. No guillotine was placed upon him, or threatened, and thus he accepts that he could do so at whatever length he considered proper, either by written or oral submissions, or by way of a combination of them both. There is no suggestion that the Judge sought to curtail his submissions at any point, or to prevent him from making any point in the manner that he considered best.

25. If Mr Draycott had chosen not to prepare a detailed written submission for the hearing on 14 January 2014, referencing all of the points he considered relevant, and placing all of the evidence into a coherent structure, then that was a matter for his own professional judgement. He did not need a formal direction from the Tribunal in order to do so. He had prepared lengthy written submissions for the hearing on 6 September 2013, and it was open to him to update those, or annotate them as he saw fit. He chose not do so.

26. Accordingly, as he accepted, Mr Draycott's core argument before me was a very simple one. It was that the very complexity of these appeals, coupled with the significant passage of time since 6 September 2013, was such that no matter the opportunities that he had enjoyed to make whatever detailed submissions he saw fit on 14 January 2014, the damage was already done. The appeal process was already procedurally unfair, and was not capable of salvage by the hearing on 14 January 2014, not least because the loser would have lost faith in the decision.

27. The real issue is therefore whether the hearing on 14 January 2014 was sufficient to render safe the assessment of the oral evidence, and/or should have been objectively sufficient to restore the loser's confidence in the correctness of the decision. (I accept for the purposes of this decision that I should assume that the confidence of these Appellants in the judicial process was already lost before the 14 January 2014, as demonstrated by the applications that were made on 30 December 2013 and subsequently, notwithstanding Mr Draycott's failure to renew the application on 14 January 2014.)

28. The pressures on the Tribunal's administration as a result of its workload are obvious to all who work in this field. Both the Appellants' solicitors and Counsel are specialists in this field and will be all too familiar with the problems. What happened in the listing of these appeals is an illustration of what is likely to happen once judicial control of the listing of an adjourned hearing is lost, and the parties fail to take the initiative in recovering that control.

29. It is plain that the Judge believed at the initial hearing that he had initially adjourned the matter to 24 September 2013, and if that had occurred it is clear that there could have been no possible complaint by the losing party. It is not at all clear to me what happened after 6 September 2013, but the suspicion is that the Judge was not given the opportunity to control the attempts to relist the appeals, and was not given the opportunity to issue suitably robust directions to ensure that the hearings were resumed as quickly as possible. That would probably have required other appeals to be adjourned to create space in his list, but there will be occasions when that course has to be taken.

30. The subsequent administrative failure to successfully list for hearing the appeals either within September or October 2013, and then the decision to try to list the appeals on a date when the Judge was not physically available to hear them in November 2013 clearly lie at the root of the lost opportunity to have the hearing of these appeals concluded within a reasonable period of time from 6 September 2013. The inability of Mr Draycott to make himself available for a hearing in December 2013 simply rendered inevitable what ultimately occurred. It is not necessary for the purposes of this decision for me to enter into any sort of enquiry as to what ultimately lay behind the inability to list the appeals into either September, October, or November 2013.

31. I have considerable sympathy for the stance that the Judge took, and the position in which he was placed. It is plain that he sought to avoid the waste of public resources. Faced with the situation that was presented to him on 30 December 2013 he sought to avoid any unfairness to the parties resulting from the passage of time by dint of devoting his own time to re-reading his notes of evidence in preparation for the hearing on 14 January 2014. There is no suggestion from Mr Draycott that he did not do so. His decision is a lengthy one, and one which must have demanded a considerable amount of his time in its preparation. Nevertheless, having reflected on the matter at some length, and not without some considerable hesitation, I am ultimately not satisfied that it can be said with confidence that the analysis of the evidence is safe, and that the losing party's criticisms of his findings are simply an unfounded expression of disappointment at the decision.

32. I have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, without any findings of fact preserved, as requested by the Appellants. In the, hopefully unique, circumstances of these appeals I am satisfied that this is the correct approach, and I note that Mr Dewison does not seek to suggest otherwise should my decision on the effects of the passage of time be as expressed above. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellants of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012.

33. Having reached that conclusion, with the agreement of the parties I make the following directions;

    i) The decision upon the appeals is set aside and the appeals are remitted to the First Tier Tribunal.

    ii) The appeals are to be listed as soon as practicable given the delays that have occurred to date.

    iii) The appeals are not to be listed before either Judge Hands, or Judge Fisher. The appeals are to be listed at North Shields allowing two full days for the hearing.

    iv) An Urdu and a Russian interpreter must both be booked for that hearing.

    v) The Appellants are to file one consolidated, paginated and indexed bundle of documents for the hearing of the appeals, which is to be prepared after liaison with the Respondent so that all relevant documents to which either party wishes to refer are to be found in one bundle. The bundle is to be filed no less than 5 working days prior to the hearing of the appeals.

    vi) The Appellants are to file a skeleton argument, which shall make appropriate reference to the bundle of documents for the sources of the points raised. It shall set out in detail each of the different limbs of the Appellants' case upon their safety in the event of their return to either Pakistan, or the Ukraine, and to any Article 8 appeal that they seek to advance.

    vii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Decision

34. The Determination promulgated on 27 January 2014 did involve the making of an error of law and accordingly the decision upon the appeals is set aside. The appeals are remitted to the First Tier Tribunal with the following directions;

    i) The decision upon the appeals is set aside and the appeals are remitted to the First Tier Tribunal.

    ii) The appeals are to be listed as soon as practicable given the delays that have occurred to date.

    iii) The appeals are not to be listed before either Judge Hands, or Judge Fisher. The appeals are to be listed at North Shields allowing two full days for the hearing.

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    vii) The Anonymity Direction previously made by the First Tier Tribunal is preserved.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 28 May 2015