



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

Appeal Number: PA/01351/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre

Decision & Reasons

On 9 February 2018

Promulgated

On 7 March 2018

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AOO

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms R Petterson, Senior Home Office Presenting Officer

For the Respondent: Mr A Malik of Westminster Law Chambers

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (AOO). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, we shall for convenience refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant claims to be a citizen of Burma of Rohingya ethnicity who was born on [] 1982. He claims to have arrived in the United Kingdom in 1993. He first made an application for leave to remain outside the Immigration Rules on 21 April 2008 but this was refused on 21 January 2010.
4. On 5 November 2010, the appellant claimed asylum having been encountered during an immigration enforcement exercise. That claim was refused by the Secretary of State on 3 December 2010 and his appeal was dismissed on 10 June 2010. He was subsequently refused permission to appeal by both the First-tier Tribunal and the Upper Tribunal and he became appeal rights exhausted on 3 June 2011.
5. The appellant made further submissions on 13 November 2012. Those related to his continued claim for asylum and humanitarian protection on the basis that he was at risk on return to Burma as a Rohingya Muslim. In addition, he relied upon Art 8 and his relationship with a British citizen, Ms W.
6. On 19 January 2017, the Secretary of State refused the appellant's international protection claim. In addition, the Secretary of State dismissed the appellant's claim, based primarily upon his relationship with Ms W, under the relevant Immigration Rule and Art 8 outside the Rules.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. Judge Price, who heard the appellant's appeal, made an adverse credibility finding against him in respect of his international protection claim. She was not satisfied that he was at risk of persecution as a Rohingya Muslim on return to Burma. Judge Price dismissed the appellant's appeal on that basis.
8. Judge Price went on to consider the appellant's claim under the relevant Rules and Art 8. She found that the appellant had a genuine and subsisting relationship with Ms W, that there were "insurmountable obstacles" to the appellant and Ms W continuing their family life outside the UK, and that their circumstances outweighed the public interest. As a consequence, Judge Price allowed the appellant's appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

9. The Secretary of State sought permission to appeal to the Upper Tribunal principally on the basis that the judge's adverse credibility finding in

relation to the appellant was inconsistent with her acceptance that the relationship between the appellant and Ms W was a genuine one.

10. On 8 September 2017, the First-tier Tribunal (Judge Bird) granted the Secretary of State permission to appeal.
11. The appellant did not file a Rule 24 response.

The Submissions

12. Before us, Ms Petterson, who represented the Secretary of State, relied upon the grounds and submitted that the judge's positive finding in relation to the genuineness of the relationship between the appellant and Ms W was inconsistent with her adverse credibility finding in relation to the appellant.
13. Ms Petterson also relied upon the grounds to the extent that they contend that the judge failed adequately to consider the public interest under s.117B of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002").
14. Mr Malik, who represented the appellant, submitted that the judge had been entitled to accept Ms W's evidence that the relationship between her and the appellant was a genuine one. He submitted that Ms W believed the appellant to be genuine. However, Mr Malik acknowledged, in response to questions from the panel, that it was difficult to find in the judgment any reasons why the judge accepted Ms W's evidence as to the genuineness of the relationship (on both sides) despite the adverse credibility finding made in relation to the appellant.
15. Mr Malik also placed before us a skeleton argument but that, largely, seeks to argue the merits of the appellant's claim under Art 8 if the relationship were, in fact, a genuine one.

Discussion

16. It is clear to us that the judge erred in law in reaching her positive factual finding that the relationship between the appellant and Ms W is a "genuine and subsisting" one. It is perhaps obvious, but nevertheless merits restating, that in order to establish that a relationship is a "genuine and subsisting" one, a judge must be satisfied that both parties are genuinely committed to the relationship.
17. In this appeal, the judge made a strong adverse credibility finding in relation to the appellant. At para 33 she stated:

"I do not find the Appellant to be a credible witness. I take into account the adverse credibility findings made by two previous Immigration Judges".
18. The judge went on however to find Ms W to be a reliable and credible witness. At para 33, the judge said this:

“By comparison I find Ms [W] to be a reliable witness. She gave clear and detailed responses to the questions put to her. I find her evidence credible”.

19. The judge did not, however, consider all of the evidence of the appellant and Ms W to coincide. In relation to the appellant, the judge noted at para 33:

“In addition, the Appellant's evidence differed significantly from that of Ms [W's] regarding the timing of their cohabitation. The Appellant stated that it was a few days after they met, his partner stated it was approximately 5-6 weeks. Further, the Appellant was vague in response to cross examination about recent photographs. Initially he stated his partner does not like to have photographs taken, and then stated that he could not find recent photographs”.
20. Having comprehensively disbelieved the appellant, including identifying inconsistencies in his evidence with that of Ms W about their relationship, the judge nevertheless found that the relationship was a “genuine and subsisting” one, in the sense that both Ms W and the appellant were genuinely in a relationship akin to marriage.
21. In our judgment, although the judge was entitled to accept Ms W's view as to her belief in the genuineness of the appellant and his commitment to their relationship, the judge simply failed to grapple with the issue of how her evidence (necessarily her belief about the appellant's genuineness) could overcome the judge's clear and unchallenged finding that the appellant was not a witness of truth. Without engaging in that process, the judge was not entitled, in effect, to accept the appellant's evidence and to find that he was genuinely in a relationship akin to marriage. In the course of his submissions, Mr Malik accepted that the judge had failed to give reasons why she accepted that the appellant was to be believed on this single issue alone. He was, in our judgment, right to do so. In those circumstances, we are satisfied that the judge erred in law and her decision in respect of Art 8 must be set aside.
22. Although Judge Price's decision to dismiss the appeal on the basis of asylum grounds is not challenged and must stand, we remit the appeal to the First-tier Tribunal in order that the decision in respect of Art 8 can be re-made. The appeal is to be heard by a judge other than Judge Price. None of the judge's findings in respect of Art 8 are preserved.

Signed



A Grubb
Judge of the Upper Tribunal

6 March 2018