



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/11197/2015
AA/11207/2015

THE IMMIGRATION ACTS

Heard at Field House on
On 30th March 2016

Decision & Reasons Promulgated
On 1st July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

(1) GSN

(2) ASN

(Anonymity direction made)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Saleem, Solicitor, Malik & Malik Solicitors

For the Respondent: Mrs N Willocks-Briscoe, Home Office Presenting Officer

DECISION ON ERROR OF LAW

Anonymity

1. This appeal is subject to an anonymity order made by the First-tier Tribunal. Neither party invited me to rescind the order. I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

Introduction

2. The Appellants are father and son and are nationals of Afghanistan. They appeal against a decision of Judge of the First-tier Tribunal Robinson dismissing their appeals against the Respondent's decision on 29 July 2015 refusing their applications for international protection on asylum, humanitarian protection and human rights grounds.
3. Permission to appeal was granted by Judge of the First-tier Tribunal McDade on 21 January 2016 in the following terms:

"The grounds of application for permission to appeals [sic] assert that the judge has misapprehended certain aspects of the evidence. For example that the judge misapprehended the relative of the Appellant who the Appellant claimed is actually missing, and an adverse inference had been drawn from the Appellant's failure to refer to the satanic verses of the Bible in his statement or any references to his father's library and that this was procedurally unfair as the appellant was not given the opportunity to respond at the hearing [sic]. These points taken together constitute an arguable error of law."

Background

4. The background to the Appellants claim is as follows. There was a dispute between the First Appellant in his capacity as a teacher and Commander Mohammed Islam - the father of a student - after he failed the student in his exams. The student made threats which the First Appellant reported to the head teacher who, in turn, advised him to report the threats to the police. The police took no action and the student continued to harass and threaten the First Appellant which culminated in an incident where unknown persons armed with knives attended his home and threatened his wife. Subsequently, the First Appellant failed the student again in his exams and Commander Islam continued to threaten the First Appellant and his family. A land dispute then ensued between the First Appellant and Commander Islam and the Appellants were attacked by his bodyguards. Upon the First Appellant reporting the incident to the police the matter was referred to the appropriate authority in Kabul and the Counter Crime Department. By this time the Appellants had been granted visit visas to come to the UK.
5. After the Appellants left Afghanistan, Commander Islam raided the First Appellant's home and found works of Marxism; Salman Rushdie's novel "The Satanic Verses" and a Bible. Commander Islam informed the local Iman who issued a fatwa against the First Appellant. During this raid, the wife of the Second Appellant was beaten and she and her brother are now missing.

The Decision of the First-tier Tribunal

6. The Judge set out the Appellants' case in a comprehensive summary between [3] and [6], and made detailed reference to the evidence and submissions between [7] and [38], the standard and burden of proof at [39], the contra case between [40] and [43], and his conclusions between [44] and [77]. The consideration of the parties' positions and the evidence is detailed.
7. The Judge concluded that the Appellants account was not credible. He noted that no reference was made by either Appellant at the screening interview to a land dispute or an assault noting, in particular, that the Second Appellant had expressly indicated that he was not persecuted by Commander Islam [50]. This was found to be inconsistent with his witness statement wherein he described an assault to which he and his father had been subjected to by Commander Islam. The Judge noted the contents of the police letter and the Appellants request for protection, and observed that very shortly thereafter the Appellants left Afghanistan to visit a family member in England. The Judge found that it was highly unlikely that the Appellants would leave behind family members whilst simultaneously claiming that they were under threat [52].
8. The Judge further found that it was highly unlikely that anyone in Afghanistan would present an English version of the Satanic Verses to a friend as a gift considering that it was the least likely book to be kept by anyone in Kabul, in light of the internationally renowned fatwa made by Ayatollah Khomeini against Salman Rushdie [53]. The Judge concluded that the First Appellant had identified three controversial books likely to upset conservative Muslim thinkers and claimed that he had them in his library. The Judge did not consider the manner in which the First Appellant obtained the books and how they were subsequently discovered was plausible. In reference to the documentary evidence personal to the Appellants, the Judge noted that the originals were not available and that the scanned copies were not all of good quality and their provenance unclear. The Judge took into account the Appellants failure to take advantage of a reasonable opportunity to make an asylum claim as damaging to their overall credibility.
9. In summarising his conclusions, the Judge stated that whilst he accepted that the First Appellant was a teacher, he rejected the remainder of the account [62]. He concluded that there was no risk to the Appellants as failed asylum seekers in-line with current country guidance, and found that they could safely return to Kabul. The Judge thus concluded that the Appellants were not entitled to international protection.
10. The Judge proceeded to consider the appeal under the Immigration Rules and on Article 8 grounds outside of the Rules and concluded that the Respondent's decision was proportionate at [76].

Decision on Error of Law

11. Having given careful consideration to Judge Robinson's decision as a whole, the grounds and submissions, I am just persuaded by a very narrow margin that the Judge erred in law such as to render the decision unsustainable.
12. Whilst the grounds of appeal plead four errors of law, Mr Saleem, rightly, recognised the inherent weakness in some of them because he made no material reference to them at the hearing and his oral submissions were faithful to the grant of permission and limited to the pursuit of paragraphs 3 and 5 of the grounds, which encompassed essentially two points, namely, a failure to consider a material fact(s) and unfairness. Outside of these two points insofar as I need to deal with them there is no merit in the grounds pleaded in the application.
13. The first point raised relates to the accuracy of the Judge's understanding of the Appellants' claim. An aspect to it is was the event that led the Appellants to claim asylum, namely, the receiving of a telephone call on 22 March 2015 from the Second Appellant's father-in-law stating that his home had been raided the day before and his daughter [the Second Appellant's wife] and her brother were missing. There is no merit in this ground. The Judge was clearly aware of the fact that the Appellants' home was raided on 22 March; that family members were said to be missing, and that, this information had been communicated through a telephone call received from the Second Appellant's father-in-law - see [6], [19], [62] and [68]. Whilst it is regrettable that at [68] the Judge stated: "*I do not accept that the appellants' son and daughter-in-law is missing*", thus identifying the wrong family members, I consider nothing turns on this - the error is not material. The Judge was clearly aware of the claim that family members were missing which in fact, I note, he correctly identified at [62]. Further, it is not incumbent on a Judge to detail every minutiae detail of a claim and I am satisfied that he took into account the details of the claim in its entirety. There is no merit in this ground.
14. Nevertheless, it is apparent from the Respondent's refusal letter that credibility was always in issue in this case. The Secretary of State did not accept the Appellants' claim and found it to be lacking in credibility. The Appellants gave oral evidence. Most of the matters on which the Judge based his adverse credibility findings were grounded in the Appellants' oral evidence and his assessment of the documentary evidence. So far, so good.
15. However, in the midst of [53], which encompasses some of the Judge's reasons he stated thus:

"The main discrepancy in this case are highlighted by the respondent in the refusal letter [sic]. The appellants sought to address these issues in their written statements. I note that Ahmad Samin makes no reference to the Satanic Verses' or the bible in his written statement and refers simply to "unIslamic books". He also makes no reference

to his father's library."

16. The Judge then proceeded to ventilate other reasons and in his omnibus conclusion at [55] stated:

"In my view the discrepancies which I have highlighted above go to the core of the appellant's [sic] claim."

17. In my judgement it is apparent that the factual omissions from the Second Appellant's witness statement were of concern to the Judge; factors which he considered related to the core of the claim. Given that the omissions formed part of the Judge's reasoning as to the credibility of the claim, he must have considered that they undermined the account. Whilst it was legitimate for the Judge to have taken the failure into account, the question is, whether it was fair to hold this against the Appellants without allowing the Second Appellant an opportunity to deal with the matter.
18. Whilst I acknowledge that the Appellants were represented before the First-tier Tribunal, the omissions identified by the Judge were not obvious and were unlikely to have been contemplated by the representative on hearing the Appellants evidence unfold. This is particularly so given that, I note, the Second Appellant did identify the books at interview [Q.66] and is a factor which the Judge appears to have overlooked. It also appears that the omissions were not relied upon by the Respondent's representative at the hearing before the Judge and, nor was the Second Appellant cross-examined on the point. In my judgement the omission was not therefore an obscure issue and it was one of the bases upon which the Judge came to the conclusion that the Appellants were not to be believed. In my judgement, the Judge was undoubtedly influenced by what he viewed as an inconsistency in the account, which I acknowledge was a view compounded by other discrepancies. Notwithstanding, in my view, fairness dictates that the concerns should have been ventilated and the Appellants should have been afforded an opportunity to address the point, and that the failure to do so caused material unfairness. I am satisfied that the Judge's approach was conceivably unfair affecting the Appellants inalienable right to a fair hearing - see AM (fair hearing) Sudan [2015] UKUT 00656 (IAC).
19. Whilst this is an otherwise well-reasoned decision the assessment of the Appellants credibility has not been adequately undertaken through the lens of the concept of fairness. Whilst the challenge is a narrow one, given the fundamental nature of the protection sought by the Appellants, the need for anxious scrutiny in cases of this type is of considerable importance. That concept must entail the Appellants being put on notice of the points that are to be taken against them and calls for a rounded assessment. I am satisfied that this did not happen in this case and the matter must be reheard. The Appellants right to a fair hearing dictates this course.

20. The representatives were in agreement should I find that the Judge erred that the appropriate course of action was remittal to the First-tier Tribunal. I agree that is the right course given that the credibility of the claim will have to be looked at afresh, with none of Judge Robinson's findings preserved, save for those relating exclusively to the Article 8 claim which are not challenged.

Decision

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision of the First-tier Tribunal. For the reasons elaborated above the appeals are allowed. As the Appellants were denied a fair hearing remittal to a differently constituted First-tier Tribunal is the appropriate course.

Signed :

Date : 1st July 2016

Deputy Upper Tribunal Judge Bagral