Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24621/2014
IA/24628/2014
IA/24636/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2016	**On 4 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

SYY
WSL
CHL
[ANONYMITY DIRECTION MADE]

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Vokes, instructed by Stephen & Richard Solicitors LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Asjad promulgated 5.5.15, dismissing their linked appeals against the decisions of the Secretary of State, dated 23.5.14, to refuse their applications for leave to remain in the UK on the basis of private and family life. The Judge heard the appeal on 13.4.15.

2. First-tier Tribunal Judge Fisher refused permission to appeal on 8.10.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Eshun granted permission to appeal on 10.11.15.

3. Thus the matter came before me on 19.2.16 as an appeal in the Upper Tribunal.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require decision of Judge Asjad to be set aside and remade by remitting the decision in the appeals to the First-tier Tribunal in accordance with the attached directions.

5. In essence, the grounds of application for permission to appeal argue that (1) the First-tier Tribunal Judge formed a negative view of the first appellant's credibility at §8 before considering all the other evidence in the case, including the expert evidence; and (2) that the judge failed to give adequate consideration to that expert evidence.

6. In granting permission to appeal, Judge Eshun considered that all the grounds disclose an arguable error of law.

7. The Rule 24 response, dated 2.12.15, submits that taking a holistic approach to the findings and reading the decision as a whole it is clear that the finding as to the first appellant's credibility at §8 is a culmination of the evidence before the Tribunal, and that Judge Asjad was entitled to conclude that the first appellant was an economic migrant, given the assessment and summary of her oral evidence.

8. The Secretary of State also submits that the judge gave sufficient consideration to the psychological report by Dr Latif between §19 and §21 of the decision and was entitled to distinguish the expert as a psychologist and not a psychiatrist and to note that the appellants have not received any medical treatment for any mental illness. In the circumstances, the judge was entitled to conclude that the report was of limited relevance.

9. In summary, it is submitted that the grounds are no more than a disagreement with the adverse outcome of the appeal and that the judge had considered all the available evidence and reached a conclusion open to her on that evidence and thus that no error of law is disclosed.

10. The cases of Mibanga v SSHD [2005] EWCA Civ 367 and Malaba v SSHD [2006] EWCA Civ 820 were cited to me in submissions, and which I have carefully considered. I was also assisted by the careful skeleton argument of Mr Vokes, dated 16.2.16.

11. Mr Tufan agreed with Mr Vokes that the structure of the decision of the First-tier Tribunal was rather unusual. There appears to be no assessment of the oral evidence or submissions and it is not clear what the judge understood the appellants' case at appeal to be. After the heading 'Issue Under Appeal and Relevant Law' the judge went straight to her findings, dealing with each appellant in turn. There is no indication, as often appears at the beginning of a decision that the judge has considered all of the evidence in the round or as a whole before making any of the findings in the case.

12. Under the heading 'My Findings: The First appellant,' the judge first summarised the immigration history at §7, but immediately thereafter at §8 stated, "There is little doubt in my mind that the First appellant is an economic migrant who came to the UK for the sole purpose of establishing a life for herself and her children. In doing so she has systematically and intentionally abused the UK Tax System – receiving free treatment under the NHS and free education for her children – none of which she was entitled to." The judge did not state that the findings are based on the reasons 'set out below,' or some other form of similar expression or explanation to help all parties to the appeal understand on what basis and in particular on what evidence the judge reached the conclusions she did.

13. It is correct that thereafter, between §8 and §12 the judge drew on certain aspects of the oral evidence of the first appellant, before restating the conclusion at §13 that she is an economic migrant who came to the UK with the intention of living here. "She ahs worked illegally in the UK, established a Company and paid no tax and she has failed to mention her Immigration Status to Educational and Medical establishments."

14. I find that Mr Vokes is correct to point out that the judge has not made it clear that all the evidence has been considered before reaching the credibility findings in relation to the first appellant. Further, the way in which the decision is set out, it appears that the judge made her findings about the first appellant before considering the case and circumstances of the second and third appellants. As stated in Mibanga, it is "axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto." It is not necessary for a judge to set out all of the evidence, or even of the submissions made by the parties, but the factual context in which a finding or conclusion has been reached must be clear. I find that the way in which the decision is structured makes it unclear whether the judge has made a fair and balanced assessment of all the evidence before reaching rather trenchant views as to the motivation and credibility of the first appellant. It would have been possible for a judge to reach the same conclusion after having conducted a careful assessment of the evidence, but the decision of the First-tier Tribunal fails to provide such an assurance, and in the circumstances this failure amounts to an error of law.

15. Further, as also stated in Mibanga, it is an error of law to reach a conclusion by reference only to an appellant's evidence and then, if it be negative, to ask whether that conclusion should be shifted by the expert evidence. Where an expert report is relevant to credibility, the judge should deal with it as an integral part of the findings on credibility rather than as an add-on. Mr Vokes points out that the judge appears to have dealt with the expert report discretely between §19 and §21, after having already made findings in relation to each of the three appellants. The judge found it relevant that neither of the child appellants had received any mental health treatment and that no outside agencies had been concerned as to their welfare. However, the report was not relied on in respect of the mental or physical health of the child appellants, but rather in relation to the psychological effect on the children of being removed from the UK in their particular circumstances. The judge does not address any other aspect of the report. In the circumstances, I find force in Mr Vokes submission that the reasoning for finding the report of limited relevance is entirely inadequate and as such amounts to an error of law.

16. In all the circumstances, there are such errors of law in the making of the decision that require it to be set aside.

17. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

18. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the making of the decision in the appeals to the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

20. The decision in the linked appeals is remitted to the First-tier Tribunal at Birmingham, to be made afresh with no findings of fact preserved;

21. The estimated length of hearing is 2 hours;

22. An interpreter in Mandarin Chinese will be required;

23. Not later than 14 working days before the First-tier Tribunal appeal hearing the appellants shall serve on the respondent and lodge with the Tribunal a consolidated, indexed and paginated bundle of all subjective and objective material to be relied on, together with any skeleton argument to be advance. The Tribunal will not accept documents supplied on the day of the hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order. Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeals, remain to be decided.

Signed

Deputy Upper Tribunal Judge Pickup