**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07261/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12 April 2019** | **On 31 May 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MRS B J K**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**
For the Appellant: Miss S Anzani, Counsel
For the Respondent: Miss S Kiss, a Home Office Presenting Officer

**DECISION AND REASONS**

1. The respondent (by whom I refer to the Secretary of State for the Home Department) appeals against the decision of Judge Mitchell to allow the appellant's appeal under Article 8 and grounds that the Immigration Rules ought to be met. Judge of the First-tier Tribunal Saffer gave the respondent permission on 18 February 2019, even though the decision had been promulgated the previous October, because he was of the view that it was arguable that the judge had made a material error of law in making conflicting findings of fact as alleged in the application.

**Background**

2. The appellant is a citizen of Bangladesh born on 23 March 1956.

3. The asylum application was made on 20 January 2017 and was refused on 20 July 2017. In the decision letter the respondent set out the background to the appeal. It seems the appellant originally came to the UK having made an online application in February 2015. However, she returned to Bangladesh but re-entered the UK on 22 May 2016. Again, she returns to Bangladesh from the UK on 13 November 2016 to find another woman in her house with whom her husband claimed to have married. The appellant's husband locked the appellant in a room, physically assaulted her and tortured her before forcing her to sign certain papers. An alternative claim was put forward that she lived in Bangladesh alone with financial support from her daughter for twenty years after divorcing her husband ten years previously. She claimed that she had a son in Bangladesh who was mentally underdeveloped, however, there was no indication of his whereabouts, and alternatively she had a son who lived with her sister whilst she was in the UK. She claimed to have diabetes and she claimed to have high blood pressure. She also claimed that her husband would kill her if she returned to Bangladesh.

4. She had applied for a visit visa on 8 April 2016 which was granted on 19 April 2016. As has been explained, she left Bangladesh on 22 May 2016 and arrived in the UK the same day, returning to Bangladesh in November 2016. Again, she left Bangladesh and came back to London Heathrow on 3 December 2016. She was refused leave to enter the UK with a right of appeal on 3 December 2016 but was allowed temporary admission on 4 December 2016 with removal directions set for 18 December 2016. It was shortly after that period that she submitted her asylum claim.

## The hearing

5. At the hearing before the Upper Tribunal the respondent, through Miss Kiss, explained that the judge had dismissed the asylum application finding it not to be credible. He had had regard to an expert report from Dr Halari but had engaged minimally with that report. The appellant clearly suffered from a language difficulty and did not speak English well. The judge nevertheless went on to decides appeal should be allowed "under paragraph 27 ADEA (1 (VI) of the immigration and under article 8 ECHR". It was submitted that Judge Mitchell had appeared to reach contradictory findings in relation to the extent of the appellant's cognitive impairment, saying at one point that she had deliberately "embellished and exaggerated" her evidence (see paragraph 52) but at paragraph 51 had accepted a degree of cognitive disability. Furthermore, the judge found that her cognitive impairment had deteriorated since her arrival into the UK. One finding that stands out, Miss Kiss pointed out, is that she had lived alone for twenty years, but that was a clear finding. In essence she submitted that the decision of Judge Mitchell did not make any sense, the reasons did not support the conclusions.

6. Miss Anzani for the appellant, on the other hand, said that it had been accepted by the judge that the appellant had been a victim of domestic

violence and although there had been an asylum claim which had been rejected against which there had been no appeal, Judge Mitchell had clearly reached a view as to the degree of the appellant's cognitive impairment, and explained the societal difficulties which the appellant would encounter in returning to Bangladesh, given the background and the finding in this case of domestic violence. The judge had given comprehensive reasons and the respondent had simply "cherry-picked" passages from the decision which appeared to contradict one another, and this had not been fair. It was acknowledged that the judge had been critical of the psychologist's report but, overall, he had he had overall accepted its conclusions.

**Conclusions**

7. Following the hearing of all submissions I considered a copy of Dr Halari's report. It contains a number of surprising conclusions. Of greater surprise is the fact that the judge appears to go each way in his decision reaching findings that are contradictory. The appellant has a family support network including a sister in Bangladesh. The judge found that she had a cognitive deterioration but overall he did not seem to regard this as significant because he rejected much of the psychologist's assessment saying he had reservations about it and saying that his assessment had not been to the gold standard that would be expected. He described the appellant's evidence in material respects as being embellished and exaggerated and he said the appellant had not been honest in the past about her reasons for coming to the UK. He considered her credibility to be adversely affected, and although he seems to have accepted there was some cognitive impairment to the appellant and therefore some negative impact in returning her to Bangladesh, he did not consider the evidence showed any negative psychological impact on the family as a whole.

8. He considered Miss Anzani's submissions but looked at the case through the prism of Article 8 having considered the requirements of the Immigration Rules and anyway would have no right of appeal against the decision under the Immigration Rules. He took into account the case of **Agyarko [2017] UKSC 11**. He clearly recognised that the appellant did not meet the requirements of the Immigration Rules because she had not lived in the UK for twenty years, having lived here for only two years. He then went on to make a finding that the appellant had a deteriorating degree of cognitive ability needing help with daily things such as dressing, feeding, washing and help with her balance, but he said that the circumstances were such that the obstacles she would face in Bangladesh were very significant and would engage paragraph 276ADE(1)(vi) of the Immigration Rules. He claimed to have taken into account the strength of public policy in immigration control in the case and considered whether it outweighed the strength of the Article 8 claim. He decided that the asylum claim was not credible. There was, the judge found, was no credible evidence that she would face a real risk of return as a failed asylum seeker. Nevertheless, the judge went on to conclude that the decision was disproportionate and allowed it under Article 8 and under 276ADE(1)(vi).

9. However, I agree with Judge Saffer's observation, when granting permission, that the findings appear to conflict with each other and with the conclusions and there is no proper Article 8 analysis as there should be prior to reaching the conclusion that he reached. The judge seems to have reached a negative view of the appellant's credibility and to have rejected some of her evidence, for example, the expert report of Dr Halari, yet went on to allow the appeal. In the circumstances, I agree with Miss Kiss that the judge's decision did not make sufficient sense for it to be allowed to stand. Whether this was simply because of a lack of careful attention to the decision writing, or whether there are more fundamental errors, does not seem important. What matters is that both sides can understand from reading the decision how this the judge has reached his conclusion.

10. Both parties agree that, on finding a material error of law in these circumstances, the decision of the FTT needs to be set-aside and a *de novo* hearing ordered. The appeal needs to be remitted to the First-tier Tribunal for the further hearing to take place.

**Notice of Decision**

11. The appeal by the respondent against the decision of the First-Tier Tribunal is allowed.

12. The decision of the First-tier Tribunal is set aside.

13. I direct, as I have been invited to by both the parties, that the matter is remitted to the First-tier Tribunal for a fresh hearing to take place before a different judge other than Judge Mitchell.

**Directions**

1. The matter is remitted to the First-tier Tribunal (not before Judge Mitchell) for a *de novo* hearing

2. No findings will be preserved.

3. A Bengali interpreter will be required.

4. All further directions to be issued by the First-tier Tribunal.

5. I direct that the anonymity direction below is continued

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

Unless and until a Tribunal or court directs otherwise, the respondent (appellant) is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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 9 May 2019

Deputy Upper Tribunal Judge Hanbury