IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-001476 & UI-2024-001475
First-tier Nos: HU/60258/2023
LH/00987/2024
HU/60261/2023
LH/00988/2024

THE IMMIGRATION ACTS

Decided without hearing under Rule 34

Decision & Reasons Issued:
On 5 August 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

KM
AA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellants appeal with the permission of Judge Dainty against the decision of Judge Swinnerton, who dismissed their appeals against the respondent's refusal of their human rights claims.

2. Upper Tribunal Judge Perkins gave directions in this appeal following Judge Dainty's grant of permission to appeal. He ordered anonymity, and he required the respondent to file and serve a response to the notice of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

3. The respondent has now filed a response to the grounds. In that response, the Secretary of State accepts that Judge Swinnerton erred materially in law in dismissing the appellants' appeals. She invites the Upper Tribunal to remit the appeals to the FtT for determination afresh by a different judge.

4. I consider the Secretary of State's concession to be properly made, for the following reasons.

5. Firstly, although the judge clearly considered the expert evidence of Dr Lawrence, she did not consider whether the appellants' inability to provide the specific information sought during cross-examination might be attributable to their diagnoses of PTSD and depression. The appellant's counsel evidently made that submission, since it is recorded at [8] of the judge's decision, but there is nothing in the judge's decision to suggest that she considered it. That she was required to do so is clear from [15] of the *Joint Presidential Guidance Note No 2 of 2010* and from *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123; [2018] 4 WLR 78. The judge's failure to apply those principles represents a legal misdirection and a failure to take a material matter into account. Given what was said by Dr Lawrence about the impairment of both appellants' concentration by their mental health conditions, I am satisfied that those errors were material to the outcome of the appeals. Ground three is therefore made out.

6. Secondly, I am satisfied that the judge failed to take account of evidence which was supportive of the first appellant's account that he was an advocate who attempted to uphold the rights of the Muslim minority in India. As contended in ground four, there was evidence of the first appellant attending a protest in India, and there was evidence from another advocate which suggested that he had been involved in such activities. That is in addition to the considerable documentary evidence which supported the appellant's claim to have been admitted to the Bar in Delhi in 2018. This material does not appear to have been considered by the judge before she reached the conclusion at [17] that the first appellant had not 'acted as a lawyer for anybody involved in anti-government activities in India'. Ground four is accordingly made out.

7. I am less sure about the first or second grounds of appeal. Despite the respondent's concession that the judge's direction as to the standard of proof was incorrect, it might have been arguable that s32(2) of the Nationality and Borders Act 2022 applied and that the judge was correct to apply the civil standard in deciding whether the appellants actually fear persecution in India. Although their applications were made on 30 May 2022, those applications were not 'protection claims' as defined, and it might be thought that the civil standard therefore applied. As to ground two, it might be thought that the judge's reasons for disbelieving the account speak for themselves and required no further development.

8. Be that as it may, I am satisfied for the reasons given at [5] and [6] above that the decision of Judge Swinnerton cannot stand and that the proper course is as proposed by the respondent. I am satisfied that I am able to make that decision without a hearing and that it is in accordance with the overriding objective to do so. I therefore set aside the FtT's decision and remit the appeal for hearing afresh by a different judge.

Notice of Decision

The appellants' appeals are allowed. The decision of the FtT is set aside. The appeals are remitted to the FtT to be heard de novo by a judge other than Judge Swinnerton.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2024