Upper Tribunal
(Immigration and Asylum Chamber)

Kalidas (agreed facts – best practice) [2012] UKUT 00327(IAC)

THE IMMIGRATION ACTS

Heard at Glasgow on 9th August 2012 **Issued on:**

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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ZAFARANI RAJAN KALIDAS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr T E Ruddy, of Jain, Neil & Ruddy, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

(1) Parties should assist the First-tier Tribunal at Case Management Review hearings (CMRs) to produce written confirmation of issues agreed and concessions made.

(2) If credibility is not in issue, it will often be unnecessary to submit a further statement by an appellant, or call her to give evidence. If this approach is taken, the judge should be told why.

(3) Any further statement should not be a rehash of what has already been said. It should be directed to the remaining live issues.

(4) Any skeleton argument should contain not just general law. It should be directed to the live issues.

(5) A judge who accepts and records an agreement is best placed to understand its scope, and should consider reserving the case to herself.

(6) Representatives are jointly responsible for drawing attention of the hearing judge to the agreement reached, and the nature of the decision still required.

(7) Judges look behind factual concessions only in exceptional circumstances. If the scope of a concession is unclear, or if evidence develops in such a way that its extent and correctness need to be revisited, the judge must draw that to attention of representatives. Adjournment may become necessary.

DECISION and DIRECTIONS

1. The appellant is a citizen of Tanzania. She sought asylum, claiming that when her father heard she had a child out of wedlock in the UK, he threatened to kill her and the child.

2. The respondent refused the claim mainly because sufficiency of protection was available to the appellant in Tanzania, or alternatively she could relocate.

3. The appellant's appeal came before First-tier Tribunal Judge Reid at a Case Management Review hearing (CMR) on 16th January 2012. The appellant was represented by Mr Ruddy and the respondent by Miss McCallum, Presenting Officer. The judge's brief handwritten note of the hearing includes the following:

> Home Office accept threatened by father. Narrow issues. Sufficiency of protection. Internal relocation.

4. For the substantive hearing in the First-tier Tribunal, the appellant's solicitors provided a skeleton argument. It does not deal with either sufficiency of protection or internal relocation.

5. The appellant's statement for that hearing runs to twelve pages. At page 7, she says she would not be safe from her father anywhere in Tanzania. At page 8, she says that the police are corrupt, and her father has money. There is little else touching on sufficiency of protection or internal relocation.

6. The appellant provided a statement from her sister. It deals with the risk from the appellant's father and brothers, but again touches hardly at all on sufficiency of protection and internal relocation.

7. The substantive hearing took place before First-tier Tribunal Judge Dennis on 1st February 2012. The appellant was represented by Mr Ruddy and the respondent by Mrs Shahid, Presenting Officer. The judge's determination, dated 14th February 2012, records that there was cross-examination of the appellant and her sister, and that the hearing, including submissions, lasted just under two and half hours.

8. Giving extended reasons, the judge did not find the evidence for the appellant credible. His determination runs to 45 paragraphs over twelve pages. Only paragraph 38 (internal relocation, 12 lines) and paragraph 39 (sufficiency of protection, 7 lines) deal with those issues. Although the judge rejects the appellant's case under these alternatives, he treats them as plainly hypothetical.

9. The appellant sought permission to appeal to the Upper Tribunal, on grounds which (as observed in the grant of permission) are unnecessarily lengthy and argumentative. Permission to appeal was granted because of Ground 1 only. This refers to the agreement mentioned at the CMR, and complains that without reference to that matter the Judge went on to assess credibility:

> One of the purposes of the CMR … is to identify what is capable of agreement between the parties and … focus the issues … the First-tier Tribunal Judge appears to have completely ignored this very important matter.

10. At the hearing before us, Mr Ruddy did not have his note of the CMR. We were able to identify Judge Reid's note on the file. The concession made or agreement reached at the CMR was not otherwise reduced to writing by parties, either then or later.

11. Mr Ruddy told us that on 1 February 2012 there was a brief "call over" of cases at the beginning of the hearing day, when representatives mentioned that there was some agreement on the issues. That was not mentioned again until final submissions.

12. The evidence from the appellant was challenged by the Presenting Officer at considerable length. Mr Ruddy made no intervention during cross-examination. That was because he believed that the questioning went not to core credibility, but to the geographical extent of the threat from the appellant's father and the practicality of internal relocation. Mr Ruddy had a typed transcript of the cross-examination, which he thought confirmed that questions did not go to whether the appellant's father ever expressed hostility to her having had a child, or ever threatened to kill her.

13. We asked Mr Ruddy why the appellant was called to give evidence. He explained that this was because her witness statement dealt also with the matters remaining in issue, and to an extent they might turn on credibility.

14. Mr Ruddy accepted our observations that it presents immense difficulty for a judge if he is not told clearly what aspects of evidence have been agreed, and what is still in issue; and also if a judge is told from another source that must accept "half a story", yet critically examine the rest. We pointed out that the appellant's statement is extensive, yet deals only briefly with what had become the live issues. Mr Ruddy explained that he had been trying to put forward as complete information as possible, and that nothing in the statement was intended to change the position agreed at the CMR.

15. Mr Ruddy also accepted that a judge is not always conclusively bound by an agreement or concession. He submitted that a judge who is inclined to reconsider such a matter must put representatives on notice. Any error lay in not giving

representatives a fair opportunity to deal with the judge's developing adverse view of credibility.

16. It was argued that although the determination deals with sufficiency of protection and internal relocation, on an *esto* basis, there is not a proper and full treatment. The judge's assessment was clouded by his earlier adverse assessment of credibility.

17. Mr Ruddy acknowledged that no submissions were made on the extent to which shortcomings or corruption of the Tanzanian police might extend to facilitation or toleration of "honour killing".

18. Mr Matthews told us that from the record available to him the Home Office's presentation at the hearing was not as to the point as it might have been. Although the Home Office had not intended their approach to be seen as a general attack on credibility, it was understandable that the judge might have understood it in that way. He accepted that it might be difficult for the appellant now to perceive that she had a fair hearing, not having been put on notice that her entire credibility was back in doubt. The judge might have crossed the line of failing to put an appellant on fair notice of matters which were live in his mind, although parties thought they were no longer issues. Apart from a brief reference at paragraph 31, there was no indication that he had done so.

19. Mr Matthews' final submission was that paragraphs 38 and 39, although brief, were adequate on the decisive issues, and that no more had needed to be said.

20. In reply, Mr Ruddy made it clear that no criticism was made of the judge's conduct of the hearing. He had not felt that anything was developing at the time in an unfair way. The outcome was unfair as a matter of law, but that arose cumulatively. Representatives, the CMR judge, and the hearing judge, all contributed to the case going wrong.

21. We advised parties of our decision that there had been error of law.

22. At paragraph 31 the judge records that he mentioned "very forcefully" that he was not bound by the respondent's acceptance of a "purported letter" from the appellant's father. However, there were communication between the appellant and her father not only by letter but also by telephone and through her sister. The judge's warning was correctly issued, but it did not go as far as to alert representatives that no agreement on fact and credibility remained effective.

23. Error began among the CMR representatives and the CMR judge. There was no common written record. Scope was left for confusion over where agreement ended and dispute began. Through a further series of minor errors by the representatives and the hearing judge, all with the effect of not drawing matters of agreement to attention as clearly as they should have been, there was unfairness.

24. The unfairness is not cured by the brief treatment of issues which had come to be seen as highly hypothetical alternatives, but which should have been the essence of the case.

25. No strong criticism attaches to anyone involved. Mr Ruddy presented his submission in a commendably measured way. A series of small omissions and unfortunate developments led to considerable wasted time and effort. The overall outcome is such that the determination must be set aside.

26. Representatives agreed that the appropriate course was a further hearing in the First-tier Tribunal, to be based on a joint minute between the parties setting out exactly which facts are agreed. The appellant's solicitor was within fourteen days of the hearing to draft a joint minute setting out precisely what was agreed between the parties, to be finalised between the parties within another seven days and forwarded to us for incorporation in directions, remitting the case for a fresh hearing in the First-tier Tribunal on the basis of accepted fact, to be resolved on the issues of sufficiency of protection and internal relocation only.

27. CMRs and agreement of facts are efficient devices for focussing the issues before the First-tier Tribunal, which can save much time and effort. Based on the agreement, any oral evidence ought to have been brief and to the point. What the case principally required was specification of background materials on sufficiency of protection and availability of internal relocation in a case of threatened "honour killing" in Tanzania. A witness statement or a skeleton argument focussed on the correct issues would have alerted the hearing judge. As matters turned out, there was a lengthy hearing and a lengthy determination resolving in detail matters which ought not to have been in dispute at all, while the real issues were given short shrift. That was such an unfair outcome that the determination has to be set aside and the decision reached again. There has been unnecessary procedure in both the First-tier Tribunal and the Upper Tribunal.

28. This case involves no novelty of law, but it is an instructive example of how far matters can go wrong if correct procedures are not followed. The following comments are of general application.

29. Parties should consider at as early a stage as possible, and preferably in advance of any CMR, what agreement can be reached on the scope of the issues and what concessions can be made. They should bear in mind the purposes of CMRs, set out in the Senior President's Practice Directions, paragraph 7. They should assist the First-tier Tribunal to produce in terms of PD 7.8:

> … written confirmation of:-
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> (a) any issues that have been agreed at the CMR hearing as being relevant to the determination of the appeal; and
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> (b) any concessions made at the CMR hearing by a party.

30. If credibility is not in issue, it will often be unnecessary to submit a further statement from an appellant, or to call her to give evidence. If this approach is taken, the hearing judge should be told why this approach is taken.

31. Any further statement should not be a rehash of what has already been said. It should be directed to the remaining live issues.

32. If an appellant produces a skeleton argument or other written submission (which is often desirable) it should not contain just expressions of general law which might apply to any case. It should deal with the live issues in the actual case.

33. A judge who accepts and records concession or agreement on the facts should consider whether to treat the case as part-heard, and reserve to herself for further hearing. She is best placed to understand the exact scope of the agreement. There may be future difficulty for another judge who is faced with partial agreement on evidence, if the challenge to the rest raises questions about the whole.

34. Representatives have a joint responsibility to draw the attention of the judge at the outset of the substantive hearing to the extent of agreement reached, and the nature of the decision still required.

35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary.

36. The nature of the error in the present case is such that no finding of the First-tier Tribunal can stand. Under Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a) the case is remitted to the First-tier Tribunal. The members of the First-tier Tribunal chosen to reconsider the case are not to include Judge Reid or Judge Dennis. The First-tier Tribunal is to reach a fresh decision based on the issues of sufficiency of protection and internal relocation, taking as its starting point the joint minute between the parties, signed on 23 August 2012.

37. No anonymity order has been requested or made.

Hugh Macleman

14 August 2012
Upper Tribunal Judge Macleman