



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: AA/04665/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2014**

**Determination
Promulgated
On 11 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ILYAS SHINWARI
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the appellant: Mr D Sills of Counsel

For the respondent: Mr S Whitworth, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State and the respondent is a citizen of Afghanistan born on 1 June 1982. However, for convenience, I refer below to Mr Ilyas as the appellant and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal.
2. The Secretary of State appeals with permission to the Upper Tribunal against the determination of First-tier Tribunal Judge Herbert OBE promulgated on 7 August 2014, allowing the appellant's appeal

against the decision of the Secretary of State made on 26 June 2014, in which the Secretary of State refused the appellant's claim for asylum, humanitarian protection and pursuant to Article 8 in the United Kingdom.

3. Permission was granted by first Tribunal Judge Heynes on 2 September 2014 stating that it is arguable that the Judge reversed the burden of proof in relation to documentation and failed to apply **Gulshan (article 8-new rules-UKUT 640 (IAC))** and failed to give adequate reasons for finding that the appellant's removal would be disproportionate.

The First-tier Tribunal's Findings

4. The Judge found the following in his determination, in summary. The appellant's account was wholly consistent with the background objective materials and plausible. The appellant gave a very detailed and careful account of the appellant's involvement with the British Army and the missions that he had been on with 42 Marine Commando. He found that the original documentation supplied by the appellant was of significant value and that there was no credible evidence before him to discount its veracity. The responsibility of disproving these documents once they have been submitted to the respondent fell on the Home Office. There is no evidence from the British Army to say that he did not work for them. Although the respondent states that checks were made with the British Army there is nothing from the British Army itself to suggest that the appellant did not work for them and the documents clearly show that the appellant was a corporal. These records could clearly been identified by the respondent. The appellant's documents and testimonials are credible documents. The appellant was an interpreter with the British Army and therefore has a well-founded fear of persecution in Afghanistan.
5. In respect of Article 8 the Judge was satisfied that the appellant is in a durable relationship with this partner who has indefinite leave to remain in the United Kingdom. The removal of the appellant would be disproportionate to the maintenance of immigration control given the fact that he has lived with this partner for a period of just over two years. He allows the appeal pursuant to Article 8.

The respondent's grounds of appeal

6. The respondent's grounds of appeal state the following in summary. The Judge made a material misdirection of law when he reversed the burden of proof in relation to the appellant's claim to have worked for the British Army as an interpreter. The Judge failed to follow the principles in the case of **Tanveer Ahmed** that it is for the appellant to show that a document on which he seeks to rely on can be relied on.

7. The Judge misdirected himself by failing to apply the correct approach to the appellant's Article 8 claim as outlined in the case of **Gulshan**. The Judge failed to give adequate reasons for his finding that it would be not proportionate for the appellant to leave the United Kingdom.

The hearing

8. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination.
9. On behalf of the Secretary of State, Mr Whitwell adopted the grounds of appeal and submitted in summary as follows. He said that on the face of it the documents permitted by the appellant not credible as for example the letter from the appellants alleged Commanding Officer had many mistakes in spelling. He said it is not the responsibility of the Secretary of State to disprove the document but it is for the appellant to show that the documents are credible. The Home Office made their own checks and found that there is no record of the appellant had being in the British army. In respect of the second ground which raises article 8, did not make a proper assessment for why it would be disproportionate for the appellant to return to his home country. He submitted that the determination should be set aside.
10. Mr Sills adopted his Rule 24 response and his written argument said in summary the following. The appellant complies with the requirements of **Tanveer Ahmed [2002] Imm AR 318**. The Judge at paragraph 34 sets out the oral evidence and finds it credible and plausible. The Judge considered all the evidence and came to a sustainable conclusion. There are particular circumstances in an individual case where it is incumbent on the Secretary of State to make enquiries. Although the respondent said that they had bid enquiries there is no indication as to what enquiries were made. There is no indication that the right name for the appellant was searched. The appellant provided photographs and to identity cards with names. There were no enquiries made about these documents. The Judge was entitled to find that the burden of proof fell on the respondent in respect of the documents. Even if there are spelling mistakes in the documents it is possible that soldiers make spelling mistakes. In respect of the insignia which the respondent claims is different this is upon the respondent having googled the insignia and see it as different. References made to the **Singh v Belgium** case where it was found that documents from the UNCHR should have been verified by the respondent. It is the responsibility of the Secretary of State to check their own army document and the Judge was entitled to find so. The proper procedure for verification has not been followed. Even if there is certain errors they are not material because the judge has assessed matters in the round. It is accepted

that the Judges reasoning for article 8 was brief but he found that the appellant was in a durable relationship.

11. Mr Whitwell in reply said that the error of law in the determination was in the Judge reversing the burden of proof.

Findings as to whether there is an error of law

12. At paragraph 34 of the determination the Judge stated that the original documentation supplied by the appellant was of significant value and there was no credible evidence before him to discount its veracity. He stated “the responsibility for disproving these documents once they had been submitted to the respondent fell on the Home Office”. The Judge further noted that although the respondent stated that they had made checks with the British Army there is nothing in itself to suggest that the appellant did not work for the British Army given that the identity documents and the employee record cards provided by the appellant are very specific about the corporal and the sergeant’s name that were a members of the British Army.
13. The Judge fell into material error because it is evident that he reversed the burden of proof and said that once the appellant has provided documents that he works for the British Army the burden now lies on the respondent to prove that the appellant had not worked for them. It was argued on behalf of the appellant that the case of **Singh v Belgium** applies in this case that it was the legal duty of the respondent to make checks with the British Army.
14. I do not understand this case to say that the burden of proof is no longer on the appellant. The Judge also fell into error when he disregarded the respondent’s evidence that they had conducted their checks which did not yield any results.
15. The Judge’s determination does not indicate that he gave any consideration to the principles in **Tanver Ahmed** that it is for the appellant to prove that the document he seeks to rely on can be relied upon.
16. The Judge did not take into account the anomalies in the documents such as spelling mistakes and the anomalies in the insignia British Army but instead said that the burden is on the respondent to disprove the documents by conducting their own checks.
17. There is also nothing in the determination to indicate that Judge considered Article 8 other than to say that he is satisfied that the appellant is in a durable relationship with someone who has indefinite leave to remain. He did not conduct a proportionality exercise. The Judge did not consider guidelines set out in the case of **Gulshan** that it would require exceptional and compelling circumstances for the

appellant to succeed pursuant to Article 8 when he cannot satisfy the Immigration Rules which are Article 8 compliant.

18. I am ultimately satisfied that there is a material error in the determination of First-tier Tribunal Judge in that he reversed the burden of proof and there is nothing in the determination to show that he gave sufficient consideration to points adverse to the documents that were set out in the reasons for refusal decision.
19. Consequential to my finding that there is a material error of law, I set aside the determination of the First-tier Tribunal preserving none of the findings.
20. Both parties agreed in such an event, the appeal ought to be sent back to the First tier- Tribunal so that findings of fact can be made. I agreed that this was the proper course of action to take in this appeal in accordance with section 7. 2 (b) (i) the Senior President's Practice Statement of 25 September 2012 as we were of the view that the appeal requires judicial fact-finding and should to be considered by the First-tier Tribunal.
21. The re-making of the decision on appeal will be undertaken by a First-tier Judge in the First-tier Tribunal other than by First-tier Tribunal Herbert OBE on a date to be notified

Decision

22. The appeal by the Secretary of State is allowed and the determination of First-tier Tribunal Judge is set aside. The case is remitted to the First-tier Tribunal for re-determination.

Signed by

Mrs S Chana

Date 9th day of November 2014

A Deputy Judge of the Upper Tribunal Judge