



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02883/2015**

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 18 September 2015**

**Decision Promulgated
On 12 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**SHAMEEN SAIFI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Johnrose for Broudie Jackson and Cantor.

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Austin promulgated on 30 June 2015 which dismissed the Appellant's appeal against a decision dated 3 February 2015 refusing the Appellant's application dated 17 September 2014 for asylum.

Background

3. The Appellant was born on 1 January 1977 and is a national of Afghanistan..
4. On 17 September 2014 the Appellant applied for asylum claiming to have fled Kabul as a result of persecution arising from her role as a schoolteacher in Kabul where she was threatened and attacked by the Taliban.
5. On 3 February 2015 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:
 - (a) It was accepted that the Appellant was a teacher in Afghanistan.
 - (b) There have been improvements in education and teacher numbers have increased particularly in urban areas such as Kabul and therefore it was not accepted that the Appellant was at risk solely for being a teacher.
 - (c) The Appellant's claim that the people who sent their children to the school where she taught were in reality members of the Taliban in order to get money for the school was inconsistent with the background material which suggested that the Taliban have taken direct action to prevent girls attending school and made no secret of their opposition to education.
 - (d) The four attacks suffered by the Appellant, non of which resulted in hospital treatment, is in contrast to the many fatal attacks by the Taliban on schoolchildren and education officials. Therefore it is not accepted that the Appellant had any problems with the Taliban.
 - (e) Neither the Appellant's husband or children have been targeted as a result of her work.
 - (f) The Appellant never reported any of the attacks to the police and the security forces have demonstrated willingness and ability to take action against the Taliban.
 - (g) The Appellant could relocate with her family to another area of Afghanistan.
 - (h) Neither Articles 2, 3 or 8 assist the Appellant.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge J Austin ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found :

- (a) While country wide girls education had been hard hit by the Taliban the situation was far better in urban areas such as Kabul where the Appellant taught.
 - (b) The Judge did not accept that the school at which the Appellant taught was effectively controlled by the Taliban as it was not accepted that female children of Taliban would be sent to a school where they were taught by a female.
 - (c) It was not accepted that the attacks suffered by the Appellant on the way to and from school were carried out by the Taliban as a result of her teaching role.
 - (d) It was not credible that if the attacks were by the Taliban they would be such low level attacks.
 - (e) There is sufficiency of protection available.
 - (f) The Appellant would not be returning as a lone female as she has a husband and family.
 - (g) The Appellant was not assisted by Articles 2, 3, or 8 of ECHR.
7. Grounds of appeal were lodged which argued that :
- (a) The Judge failed to take into account material evidence in that the Appellant's daughter was receiving counselling and this was not considered in the decision.
 - (b) The Judge failed to take into account the hearsay evidence of the Appellant's daughter.
 - (c) The Judges approach to the evidential value of the warning letter was flawed.
 - (d) The Judge incorrectly imposed in paragraph 37 a requirement of corroboration.
 - (e) The background evidence that women cannot rely on the protection of the state authorities was contradicted by the Judges finding that she would have sufficiency of protection.
 - (f) The Judge failed to take into account that the claim was a gender based one.
 - (g) The Judge failed to engage with the argument that requiring her to stop teaching was inconsistent with the principles in HJ Iran.
 - (h) The Judge has applied the wrong standard of proof.
8. On 23 July 2015 First-tier tribunal Judge Ford gave permission to appeal on all grounds.
9. At the hearing I heard submissions from Ms Johnrose on behalf of the Appellant that:
- (a) She relied on the grounds of appeal.

- (b) The Judge failed to take into account material evidence that is the evidence of the letter from her daughter's counsellor in which he or she recorded the daughter's account of what her mother had told her about being attacked by the Taliban and this was potentially corroborative of the Appellant's account.
- (c) The Judge's assessment of the warning letter was flawed in that it was confused: stating firstly that the Judge gave some weight but then finding that he gave it no weight. The Judge's approach to the warning letter was fundamentally flawed in that he made an assessment of credibility first then he went on to consider the letter and reject it.
- (d) The Judge wrongly suggested at paragraph 37 that there was no corroboration of her account of the attacks on her by the Taliban on the way from school when there was material before him at page 93 of the bundle showing that other teachers had been attacked.
- (e) The Judge applies the wrong standard of proof on a number of occasions referring to his assessment being 'on balance.'
- (f) The Judge fails to engage with the core of the Appellant's claim in stating at paragraph 40 that it was not a gender based claim whereas the core of her case was that she was a female teacher teaching girls and was targeted on that basis. There was no clear assessment of whether she was at risk for that reason.
- (g) There are confused findings in relation to sufficiency of protection in paragraph 43 accepting that the Appellant could not rely on state protection and at paragraph 46 that there would be sufficient protection.

10. On behalf of the Respondent Ms Johnstone submitted that :

- (a) The Judge took into account the counsellors report making specific reference to it at paragraph 53 of the decision. The report was hearsay and there was no statement from the daughter. In the light of the evidence before him his findings were open to him.
- (b) The Judge considered the Taliban letter in the chronology he set out in the case. He took a holistic approach to the evidence and made conclusions about the weight he gave to the letter that was open to him.
- (c) There was nothing in the report at page 93 of the bundle that was inconsistent with the material before the Judge.
- (d) In relation to the Judge's explanation of the standard of proof it was clear from paragraphs 7 and 32 that this was correctly understood. There was nothing objectionable about the term 'On balance.'
- (e) There was no error in paragraph 40 in stating that this was not a gender based claim as the Judge stated it was based on her claim to be a female teacher. The assertion that it was a claim based on

political opinion was also accurate in that this was one of the grounds of appeal.

Finding on Material Error

11. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
12. I find no merit in the ground that the Judge failed to consider material evidence in that he failed in his findings, which appear to start at paragraph 32, to make specific reference to the letter at page 20 of the bundle from a school counsellor to the Appellant's 15 year old daughter. The Judge at paragraph 32 stated that he had '*considered very carefully all the available evidence in this appeal*' and there can be no suggestion that he overlooked the existence of the counsellors letter as he specifically refers to it at paragraph 53 in the context of his assessment of Article 8. The Judge is not required to specifically refer to every piece of evidence in the case and I accept does not refer to this letter in the context of his credibility findings but I am satisfied that in relation to those findings the letter could not have made any difference to the outcome. The first and obvious point is that the contents of the letter are entirely hearsay and there was no explanation or indication of why the Appellant's daughter had not herself provided a witness statement even if she felt unable to attend court: this would inevitably have impacted on the weight given to the report as it was impossible on the basis of the report to determine what parts of it were based on personal , direct, eye witness evidence and what was based on information provided to the daughter by her mother . The report was written on 22 April 2015 seven months after their arrival in the UK: there is no indication in the letter of the basis of the contents of the letter, was it based on contemporaneous notes of meetings with the daughter, when did these meetings occur, was it one or more meetings.
13. It was argued that in concluding that he did not attach significant weight to the threatening letter that the Appellant claimed she received from the Taliban the Judge fell into error. Ms Johnrose argued that the Judges approach to the evidence was fundamentally flawed in that he stated in paragraph 39:

"However due to the fact that the Tribunal declined to find to the relevant standard of proof, the lower standard, the Appellant's claim of having endured a period of 9 years of harassment by the Taliban was credible , it was led to the conclusion that this was a document which did not carry any significant weight."
14. Ms Johnrose argued that whilst other evidence may well have a bearing on the reliability of the document the Judge was required not to 'put the cart before the horse', as the Tribunal said in MT (Syria) 2004 UKIAT 000307. In that case the Adjudicator had stated: "In view of my findings on the Appellant's credibility, I give no weight to these documents" which is, in essence, what the Judge has said in this case. The Tribunal concluded that the Adjudicator had not weighed the document as part and parcel of

the process of looking at the evidence in the round to assess credibility but had effectively reached his credibility findings without reference to the document and then assessed the document on the basis of those flawed findings. He had fallen into the trap identified by the Court of Appeal in Ex parte Virjon B 2002 EWHC 1469, a case in which the Adjudicator had assessed a medical report on the basis of his credibility findings rather than reaching his findings on the basis of all the evidence including the medical report. I am satisfied that the Judge's approach to this document was fundamentally flawed as it was clear from paragraph 38 that he had reached a conclusion about the credibility of the Appellant's claim before considering the letter in the following paragraph. This error I consider to be material since had the Tribunal conducted this exercise the outcome of the assessment of the credibility of the claim could have been different.

15. The grounds argue that the Judge erred in the application of the standard of proof in his decision because in addition to repeatedly stating 'on balance' in his findings at paragraph 38 he concluded: "*The Tribunal therefore did not accept that the Appellant could be said on the balance of probabilities to be unable to return to Afghanistan owing to fear of persecution.*" This of course is a misstatement of the standard of proof in an asylum appeal, an issue fundamental to the fair assessment of the claim.
16. I have considered the argument carefully. The Judge set out the burden and standard of proof at paragraph 7 of the decision and Ms Johnrose accepted that it was accurately summarised. He expounded on it again at paragraph 32 and referred to the requirement for a 'reasonable degree of likelihood' that events occurred which she accepted was unobjectionable. It is of course not enough to simply state the standard of proof accurately it must also be the standard that the Judge *applied* to his findings.
17. In the absence of the very clear misstatement of the burden of proof at paragraph 38 I would have considered whether in using the term 'on balance' the Judge was merely using an idiomatic expression that means taking all of the evidence into account: however paragraph 38 is in my view his conclusion in relation to the risk of persecution and the standard he has applied is wrong in law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different.
18. The Judge's findings in relation to sufficiency of protection were also challenged in that they were contradictory and confused. I do not find that this ground is made out: paragraph 43 quotes the OGN which draws a distinction between the position of lone females and women with a male support network and in paragraph 46 the Judge finds that as the Appellant would return to her husband she would not be at risk. Moreover given that the Judge did not find that the Appellant's account of her difficulties in Kabul was credible his assessment of sufficiency of protection was unnecessary and therefore not material to the outcome.

19. It was also argued that the Judge had failed to grasp the basis of the Appellant's claim in that at paragraph 40 (under the heading of Sufficiency of Protection)he stated: "It is important to note that the Appellant was not claiming they (sic) need for protection on the basis of gender but on the basis of her activity as a female teacher." I am satisfied that the Judge throughout the decision was clear that the Appellant's claim was based on her risk as a female teacher and was simply , if unnecessarily, stating that her claim was not based on gender alone.
20. I nevertheless found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety given in particular the error in relation to the standard of proof applied infected all of the credibility findings. All matters to be redetermined afresh.
21. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
22. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the application of the incorrect standard of proof which is fundamental to the credibility findings overall. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.
23. I consequently remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before any First-tier Immigration Judge other than Judge Austin.

Signed

Date 6.10.2015

Deputy Upper Tribunal Judge Birrell