IAC-AH-DN-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20953/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th September 2015	**On 21st October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MIRZA KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ell, Counsel
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan born on 1st January 1966. The Appellant claims to have arrived in the UK on 23rd May 2006. The Appellant claimed asylum and his appeal was dismissed on 19th June 2006 and subsequently his appeal rights became exhausted on 28th June 2006. The Appellant was not removed from the United Kingdom and on 11th January 2011 he asked that his representations be considered as a fresh application for asylum and for a claim pursuant to the European Convention of Human Rights. This application was refused on 27th March 2012. On 10th October 2013 a further application form was submitted this

time for indefinite leave to remain on the basis of compassionate circumstances and this was rejected on 28 October 2013. Yet a further application was submitted on 19th November 2013 for indefinite leave to remain again on the basis of compassionate circumstances and this application was also refused by a Notice of Refusal dated 8th May 2014. By a letter dated 19th November 2014 the Appellant's application for indefinite leave was given further consideration by the Respondent where it was found that the Appellant's presence in the UK was not conducive to the public good because he was excluded from the Refugee Convention for a serious non-political crime and the Appellant's application for indefinite leave to remain was refused.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal O'Rourke sitting at Newport on 1st April 2015. In that determination Judge O'Rourke noted that the appeal was made under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the decision to refuse an application for indefinite leave to remain on the grounds that the Respondent was not satisfied that the Appellant's family or private life was sufficient to satisfy Appendix FM or paragraph 276ADE(1) of the Immigration Rules. That decision was upheld on appeal and the Appellant's appeal was dismissed in a promulgation handed down on 16th April 2015.

3. On 27th April 2015 Grounds of Appeal were lodged to the Upper Tribunal. On 16th June 2015 First-tier Tribunal Judge Levin granted permission to appeal. In granting permission Judge Levin noted that going back to the original asylum appeal in 2006 Judge Harmston had noted that the Appellant had given no reason for his failure to attend that hearing and even if Counsel's record of the Appellant's evidence given at the hearing before Judge O'Rourke at paragraphs 4 and 5 of the grounds were correct he gave no reasons or no good reasons for his failure to attend the hearing back in 2006. He considered that it therefore followed that there was no merit in the suggestion that the judge had erred in his finding that the Appellant gave no reason for his failure to attend the hearing of his asylum appeal either at the hearing in 2006 or at the hearing before him.

4. Judge Levin noted that the grounds, which were settled by Counsel who had represented the Appellant at the hearing, asserted that the Appellant complained during the hearing that he was unable to understand the interpreter and that the Record of Proceedings recorded that a Pashtu interpreter was booked for the hearing. He noted that the judge's decision was silent as to any interpretation problems but considered that if what Counsel asserted in the grounds was correct then arguably the judge had erred by continuing with the hearing. He considered that in such circumstances it was arguable that there had been a procedural unfairness amounting to an error of law and that it would be necessary to seek the judge's comments thereon.

5. With reference to the Appellant's claim that he would be at risk of suffering serious harm in Afghanistan so as to breach Articles 2 and 3 of

the ECHR, Judge Levin considered that it was arguable that the judge erred by simply finding that the issue was "*res judicata*" by reason of the findings made by Judge Harmston in the 2006 determination of the Appellant's asylum appeal and by failing to follow the *Devaseelan* guidelines and to consider the evidence before him which was not before Judge Harmston, matters which had arisen thereafter and the changed country conditions. On that basis Judge Levin granted permission to appeal.

6. On 2nd July 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That written response contended that the Judge of the First-tier Tribunal had directed himself appropriately. The Rule 24 response points out that the judge did not indicate that there was any issue with interpretation and it was not apparent to the grant of permission that it was recorded as such in the Record of Proceedings. The Secretary of State contends that this was an important matter that should have been raised either during the hearing or at the very least after the hearing but that this did not appear to be the case and that Judge O'Rourke had, on a careful reading of the determination, considered breach of the ECHR which is evident at paragraph 13 of his determination. The Rule 24 response goes on to contend that the grounds have no merit and amount to mere disagreement with the adverse outcome of the appeal without identifying any arguable material error of law.

7. The matter next appeared before Judge Murray sitting as a Deputy Judge of the Upper Tribunal on 17th August 2015. Judge Murray granted a request at that stage for an adjournment and gave a direction that both parties were to file and serve witness statements dealing with the assertion in the grounds of permission that there were issues in relation to interpretation and that the parties were to agree and note the proceedings before the First-tier Tribunal.

8. It is on that basis that this matter comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge, Judge O'Rourke. The Appellant appears by his instructed Counsel, Mr Ell, and the Secretary of State appears by her Home Office Presenting Officer, Mr Bramble.

Documents

9. I am referred by the legal representatives to two additional documents which I am asked to consider and which I give due and proper consideration to. The first is a memorandum which dates back to April 2015 from Hollie Davies, the Home Office Presenting Officer who attended before the First-tier Tribunal. In addition I am provided with a witness statement from Morgan Read who appeared as Counsel for the Appellant before the First-tier Tribunal. The witness statement of Mr Read is served late but Mr Bramble does not take issue with that fact and there is no request made before me for yet a further adjournment.

10. The second is a minute by Miss Davies, the Home Office Presenting Officer before the First-tier Tribunal. Mr Bramble points out that Miss Davies' minute indicates that the Appellant states he was not aware of the hearing in 2006 and he accepts on behalf of the Secretary of State that that is the position maintained by the Appellant and his legal representatives. However he points out there is no record of the proceedings on file, that there is no point in seeking a further adjournment because quite simply such record is not going to be forthcoming. He acknowledges that it may be in the interests of justice bearing in mind that there is no possibility of an agreed minute and that it is possible that the Appellant did not understand the interpreter that the matter would be best dealt with by way of a remit to be re-heard providing that can be shown to be a material error of law. Whilst noting that Mr Read had contended that there had been changes in the law with regard to Article 1(F) since 2006 Mr Bramble points out firstly that Judge O'Rourke records that there was little argument or case law advanced in support of that contention and secondly poses the question as what has changed since 2006 which has merit for the Appellant. He submits there is nothing to show the position with regard to the Appellant's circumstances as they would be in Afghanistan and wonders how much further a re-opening of the matter would take us. He submits that the Appellant's solicitors have failed to show what has changed and therefore it is for the Appellant's solicitors to show that there is a material error which would require a remittal. He further points out that interpreter issues were never raised at the previous hearing and that whilst there was this examination of the Appellant if nothing is shown to have changed then the principles of *Devaseelan* are binding.

11. Mr Ell contends that the judge's analysis of *Devaseelan* is wrong and that there must be evidence for him to reconsider and that as the Appellant was not present in 2006 in the absence of the Appellant the judge himself made findings which he was not entitled to. He submits that there is a material error of law on that alone and that the correct process is for the matter to be re-heard.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law

for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

14. It is clear that the Secretary of State has not helped herself in this matter by allowing an inordinate period of time to elapse between the initial decision in 2006 and subsequent applications and the complete failure of the Secretary of State to take any steps to remove the Appellant from the UK. Judge O'Rourke was placed in an extremely difficult position and is correct in his starting point when he says he cannot re-assess the factual determination of 2006. However I agree that the judge has erred in his analysis of *Devaseelan* in that there has to be evidence for him to reconsider and the concession made by Miss Davies in her note the Appellant had stated that he did not know about the hearing in 2006 differs from the finding of Judge O'Rourke at paragraph 9(i) that the Appellant had not attended the hearing or explained his absence then or now. Such a finding does not sit comfortably with the note of the Home Office. Consequently it is possible bearing in mind the recording of the position by the Home Office representative that the First-tier Tribunal Judge was not entitled to draw the conclusion that the Appellant had not provided any explanation for his absence in 2006.

15. There is nothing within the determination to indicate that there has been any difficulty in interpretation given the fact that at paragraph 9(ii) Judge O'Rourke finds:

> "It proved extremely difficult in cross-examination to get direct answers from the Appellant, to include an explanation as to why this attack had occurred."

Such an analysis may well have tainted the adverse credibility findings if the interpreter had not been able to understand the Appellant and this may well prejudice the fairness of the proceedings. I acknowledge that this does beg the question as whether the findings made by the judge were as a result of poor interpretation or to the vagueness of the Appellant's responses.

16. When looked at together and particularly with regard to the issues of fairness that have developed in this case I am satisfied that there are errors of law and that they are material and that the correct approach is for the matter to be remitted back to the First-tier Tribunal for re-hearing with none of the findings of fact to stand.

17. I am aware that unfortunately due to the difficulties of court listing the obtaining of a re-hearing date can take some considerable time. The history of this matter is one that causes considerable concern and whilst I have no influence over the listing of this matter I would urge that the administration list this matter at the first available date. Directions are attached within the decision herein.

Decision

18. The decision of the First-tier Tribunal contains a material error of law and is set aside. None of the findings of fact are to stand. The matter is remitted to the First-tier Tribunal to be heard at either Newport or Hatton Cross on the first available date 28 days hence with an ELH of three hours. It is recorded that if possible this hearing be expedited and that it is for the solicitors instructed by the Appellant to ensure that the Tribunal is notified within seven days of the handing down of this decision of the language requirements of their interpreter.

19. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

There is no fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris