



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02011/2016

THE IMMIGRATION ACTS

Heard at Field House

On 26th September 2017

**Decision & Reasons
Promulgated
On 2nd October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**JT
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs F Mustapha, Solicitor

For the Respondent: Mr P Nath, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Gandhi dismissing his appeal for protection on the basis of asylum, humanitarian protection and human rights grounds.
2. The Appellant was granted permission to appeal by First-tier Tribunal Judge Osborne. The grounds upon which permission was granted may be summarised as follows:

“The grounds assert that the judge found the Appellant’s account to be credible and so erred in the reasons provided and findings on risk on return. The judge’s findings and reasons at [64] to [66] are at odds with the various credible objective material specifically on this point to which the judge was specifically referred. Additionally there was a substantial and unexplained delay of six months between the hearing and the promulgation of the decision. The Court of Appeal cited with approval from *Sambasivam* [2000] Imm AR 85 a statement from *Mario* [1998] Imm AR 281 at 287:

‘In an area such as asylum, where evidence requires anxious scrutiny, the Tribunal will usually remit a case to another Adjudicator where the period between the hearing and the dictation of the determination is more than three months. The delay is inordinate and gives rise to legitimate concern as to whether the Appellant received a fair hearing of the appeal. The judge could not be expected to retain a proper level of recall of the oral evidence after three months.’

In an otherwise well-structured and focused decision and reasons it is nonetheless arguable that a delay of approximately six months in the promulgation of an asylum appeal is too long. Per the Lord Chief Justice in *R v Sussex Justices ex parte McCarthy* [1924] 2 KB 224, ‘justice should not only be done but should manifestly and undoubtedly be seen to be done’. It is arguable that the judge could not have recalled the Appellant himself after a delay of six months. This arguable error of law having been identified, all the issues raised in the grounds are arguable.”

3. I was not provided with a Rule 24 reply by the Presenting Officer and was told that it was not necessary and was encouraged to hear the appeal and consider oral submissions from the Respondent in any event.

Error of Law

4. At the close of the hearing I indicated that I would reserve my decision which I shall now give. I do find that there is a material error of law such that the determination should be set aside. I must make clear that I see *just* sufficient merit in the Grounds of Appeal that the determination should be set aside. My reasons for so finding are as follows.
5. In relation to the six month delay as observed in the grant of permission it is unfortunate and unusual that it occurred. I was told, however, by the Appellant’s solicitor in an admirable display of candidness that there was no evidence in the determination of any lack of recall or significant impact as a result of the six month delay. Indeed, the judgment does on its face appear to be well-structured and focused as the grant of permission equally reflects. However, reading the determination as a whole, given the significant positive credibility findings which are self-evident from paragraphs 46 through to 60 of the determination, the Appellant’s

representative is not incorrect in submitting that one could express surprise at the final outcome reached by the First-tier Tribunal. However, that does not indicate any perversity such that the decision should be set aside of course.

6. In my view the findings which led to the downfall of the Appellant's appeal at paragraphs 64 to 66 do not take account of the objective material that was put forward on the Appellant's behalf, which is an omission that causes me to question whether it was open to the First-tier Tribunal to reach the conclusion it did at paragraphs 64 to 66. Although the First-tier Tribunal noted at paragraph 48 the letter from the foster carer at page 7 of the Appellant's bundle in my view the impact of the carer's indirect evidence from the British Red Cross that there was not much hope of the Appellant finding *any* of his family has not been reflected in the judge's assessment at paragraphs 64 to 66 and at paragraphs 69 to 71 where it is concluded that there are no reasons or evidence why the uncle could not live in Kabul or the uncle could not travel there to meet the Appellant upon his return from the UK, notwithstanding that there was no evidence of contact with the uncle and it being observed that there were no efforts made to contact the uncle. This omission is crucial because the judge has made clear that the Appellant and his documentation were credible. If she had not, then it would be of no consequence.
7. The fact that the Appellant's evidence was accepted as credible and his evidence that there was no contact with the uncle at present, alongside the failure to trace the uncle against the indirect hearsay evidence of the foster carer that there was not much hope of finding any of the Appellant's family, results in an adverse conclusion that fails to sufficiently grapple with that evidence and is consequently perverse. I do note the First-tier Tribunal's concern that there was no further evidence of tracing members of the Appellant's family, notwithstanding that his parents had disappeared.
8. I pause to comment that it is of concern that the Appellant has not attempted to trace the uncle and I note that the First-tier Tribunal Judge did observe that the phone number for the uncle might be found on the old phone bills for the foster carers, given that their phone was used to telephone the uncle in the past. I was told by the Appellant's solicitor that those bills could not be found. However, it is not for me to hear evidence on this matter and it will remain for the Appellant to sufficiently demonstrate the attempts made by him to trace his family including his uncle in Afghanistan if he wishes to establish that he will be an unattended or unattached child pursuant to the authority of *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)*, that his solicitor sought to rely upon.
9. On that note, I observe that the judge considered the first two headnotes of *AA (Afghanistan)* in her determination at paragraph 19. However, in my mind the judge needed to engage more directly with paragraphs 91 to 92 of *AA (Afghanistan)*, which underline the headnote and in essence show

that the question of risk is to be gauged by whether the child has the “protection of the family” including their individual circumstances and whether the exposition to a risk of serious harm is therefore likely or not.

10. As an addendum, I observe that I did not find merit in the Appellant’s suggestion that the fact of his being a member of the nomadic Kuchi tribe will be sufficient to demonstrate that the family could not be traced albeit they are a migratory group of nomads. The previous position on Kuchis, seen for example at paragraph 8 of *WK (Credibility, Hizb-i-Islami, Pashtuns, Kabul) Afghanistan* [2004] UKIAT 00280 which references objective material shows that, historically, the Kuchis were numbered at 60,000 nomads at that time, and were accustomed to migrating between the seasons. As such the disappearance of the Appellant’s family is not entirely inexplicable or unpredictable and may simply be due to migration. Thus, although the tribe’s nomadic nature is a relevant factor it would not demonstrate in of itself that he would not be a protected child. More would be required than this.
11. Consequently, whilst this matter has given me great pause in deciding whether a material error of law cumulatively exists in this determination, as indicated earlier, I *just* find that the determination is such that it does contain errors of law which are cumulatively material and are such that the determination should consequently be set aside to the requisite standard identified in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982.

Notice of Decision

12. The appeal to the Upper Tribunal is allowed.
13. The decision of the First-tier Tribunal is hereby set aside and the matter is remitted to be heard by the First-tier Tribunal by a differently constituted bench.
14. The First-tier Tribunal’s anonymity direction is maintained.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Saini