Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07323/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2017	**On 15 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

O A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge C M Phillips (the judge), promulgated on 1 February 2017, in which he dismissed the Appellant's appeal on all grounds. That appeal to the First-tier Tribunal had been against the Respondent's decision of 21 June 2016, refusing his protection and human rights claims.

2. The Appellant had arrived in the United Kingdom in 2008 as a minor. His original asylum claim had been refused and a subsequent appeal dismissed in 2011. In respect of the latest claim, the Appellant relied in part on what he had said in the original claim, but also asserted that his time in the United Kingdom and his adaption to the way of life here would

on return to Afghanistan place him at risk as being perceived as a "westernised" person. In respect of his human rights claim he asserted that he was in a genuine and subsisting relationship with a Polish national with whom he had a child. They had cohabited together for some time and intended to reside together permanently in this country.

The judge's decision

3. The judge concluded that in light of the previous Tribunal decision, the Appellant's claim as originally put forward failed. The judge notes the Appellant's assertion that he faced risk on return as a westernised person (paragraph 62). He concluded that this status did not constitute a particular social group and therefore there was no Convention reason. At paragraph 64 the judge cites a particular passage contained in the Respondent's Country Information Guidance on Afghanistan and concludes that in general there is no risk to returnees simply because they have come back from western countries.

4. The judge goes on to consider Article 15c of the Qualification Directive. He concludes at paragraph 69, relying on the case of Naziri [2015] UKUT 00437 (IAC) and HN (Afghanistan) that the country information relied on by the Appellant before her did not "overturn" the findings in the country guidance case of AK (Afghanistan) [2012] UKUT 163 (IAC). At paragraph 70 the judge reiterates his conclusion that any westernisation on the Appellant's part had not been shown to be an immutable characteristic. The humanitarian protection claim failed as well.

5. In respect of Article 8 the judge finds that the Appellant's relationship with his partner was not a genuine one and that he had effectively deceived her into thinking that it was. His findings are set out at paragraphs 80 to 89. He finds that the Appellant's failure to report to the Respondent in respect of his immigration status was a significant factor that went to the question of whether his relationship with his partner was genuine. He refers to a previous relationship with another woman and finds that this too undermined the Appellant's credibility.

6. At paragraphs 83 and 84 the judge finds against the Appellant on the basis of cultural and religious matters. The evidence of two supporting witnesses is rejected (paragraphs 86 and 87). It is said that they were not independent as they were friends of the Appellant. At paragraph 89 the judge finds that the Appellant's partner had a genuine and subsisting relationship with their son but finds that the Appellant's relationship with both the partner and their child was not a genuine one. The appeal was therefore dismissed.

The grounds of appeal and grant of permission

7. The grounds of appeal are fairly lengthy and seek to attack all aspects of the judge's findings and conclusions. In essence they assert that the judge misunderstood the nature of the Appellant's claim under the

Refugee Convention, failed to have regard to whether or not the Appellant could modify his behaviour on return to Afghanistan, failed to assess or give any reasons in relation to the country information relied on by the Appellant, and made several errors in relation to the assessment of the Article 8 claim.

8. Permission to appeal was initially granted by First-tier Tribunal Judge Page on 13 April 2017. The application decision was sent back to Judge Page for clarification. He then confirmed that his grant of permission was limited to the Article 8 related grounds of appeal only.

The adjourned hearing

9. This matter first came before me on 2 May 2017. Ms Radford sought to renew the ground of appeal relating to the protection issues. Mr Whitwell was unaware of the limited grant of leave and of the Appellant's intention to renew the protection ground. In light of the circumstances of the case and the nature of the list on that day I deemed that it was unfair on Mr Whitwell to deal with this new issue at that stage. I therefore adjourned the error of law hearing. Before doing so I heard argument on whether or not permission should be granted on the protection grounds.

10. After hearing argument from both representatives I decided that permission should be granted. It was arguable that the judge had erred in the manner set out in the Appellant's grounds of appeal.

The hearing on 7 June 2017

11. Ms Radford submitted that the judge had misunderstood the Appellant's claim: it was not said that he was part of a particular social group, but rather that the westernisation issue involved the imputation of a political opinion by non-state actors. It was this that would lead to a risk. I was referred to the skeleton argument before the judge. This error would be material if the judge had also erred in respect of her consideration of the country information. Ms Radford referred me to paragraph 64 of the judge's decision in which only one aspect of the country information had been cited and relied upon. The judge was wrong to regard this passage as representing the "general assessment" of risk on return to those coming back from western countries. I was referred to a schedule of key passages of the country information set out in the Appellant's bundle. Ms Radford submitted that the judge had failed to engage with any of this evidence, even in fairly brief terms. In respect of the Appellant keeping a low profile, the judge had not engaged with the principles set out in HJ (Iran) and RT (Zimbabwe). This particular issue had not been raised by either the Presenting Officer or the judge at the hearing. In respect of humanitarian protection and Article 15C of the Qualification Directive, Ms Radford submitted that the judge was wrong to have relied on the case of Naziri, it being only a judicial review case, and that in any event the

country information relied upon by the Appellant before the judge postdated the judgment in Naziri.

12. In respect of the Article 8 issue, Ms Radford relied on the grounds of appeal. In respect of the Article 8 issue. She submitted that the judge had erred by failing to deal adequately with the Appellant's relationship with his son and that there was nothing in respect of the Appellant's partner's evidence

13. Ms Ahmad submitted that the judge did not have to provide reasons for each and every element of the Appellant's case. However, she accepted that the judge had not engaged with the Appellant's evidence. If there was an error it was not material because Ms Ahmad submitted the Appellant's case was bound to fail. There was nothing in his evidence to suggest that he was westernised or would be perceived as such upon return. Ms Ahmad acknowledged certain failings within the judge's decision but submitted that the ultimate conclusions were open to her.

Decision on error of law

14. I conclude that there are material errors of law in respect both of the protection and Article 8 issues.

15. First, the judge was wrong to have assessed the Appellant's refugee claim in the context of whether or not he was part of a particular social group. That was not the way in which the Appellant's case was put to him. Rather, it had been argued that the westernisation issue created the risk of an imputation of political opinion. The judge's error would not of itself be material. However it must be seen in light of what I say about other matters, below.

16. Second, in my view the judge has failed to grapple with material country information relied upon by the Appellant. The first example of this relates to paragraph 64 of his decision. The judge concludes that the general assessment of risk is represented by passages from a report cited at paragraph 8.9.3 of the Respondent's Country Information Guidance Report. Having examined that passage at the hearing it is clear that it emanates from one particular source. In contrast, the UNHCR took a different view. The judge she has failed to state why she preferred one source of evidence to that of another when concluding that the general assessment did not indicate any risk to western returnees.

17. The second example of the failure to engage with the country information relates to paragraph 69. There was, it is clear, a large amount of relevant country information before the judge to which reference was made both in the key passages section of the index and the Appellant's skeleton argument. The judge has simply failed to engage with this evidence to any meaningful extent. One does not expect each and every item to be considered in great detail but there must nonetheless be a sufficiency of engagement and reasoning to indicate that a material matter has been

properly considered in the context of the way in which the Appellant's case has been put. The judge has relied on the "findings" in Naziri. The problem with this is that that decision was of course in the context of a judicial review claim, not a statutory appeal. In addition, the relevant country information relied upon before the judge postdated that which was before the court Upper Tribunal in Naziri. The information had moved on, but the judge apparently failed to appreciate this. In my view the judge's failure to engage with the country information went not only to the issue of Article 15c, but also the refugee case: the same information was material to the potential risk under both heads of claim.

18. I disagree with Ms Ahmad's suggestion that the Appellant's case was bound to fail in any event. It was by no means certain that he would have succeeded, but there is at least an arguable case that somebody in the Appellant's situation might potentially be targeted by non-state actors on return to Afghanistan. As an aside, I note that the judge has not in fact engaged in clear and detailed fact-finding as to what extent the Appellant is a westernised person. This is something that should have been addressed in the context of the way in which the Appellant's case had been argued.

19. Third, the judge failed to engage with the issue of whether or not the Appellant could be expected to "maintain a low profile" on return in order to avoid any potential risk. Such an issue clearly raises the question as to whether such behaviour would be compatible with HJ (Iran) and RT (Zimbabwe).

20. I turn to the Article 8 issue. There are several material errors in this respect.

21. First, in my view the judge has failed to provide adequate reasons as to why the Appellant's failure to report to the Respondent was deemed to be so significant to the issue of whether the relationship was genuine or not. This is stated as being the first reason in the judge's mind for finding that his relationship with his partner was not genuine at all. I appreciate that weight is a matter in general terms for the fact-finding Tribunal. However, the judge has in my view failed to say why this factor was being regarded as so important.

22. Second, and more importantly, it is quite clear from what the judge has said that the points taken against the Appellant in paragraphs 83 and 84 were material to her overall conclusions. I have carefully considered the Record of Proceedings and can find no evidence that the Appellant was cross-examined or questioned in any other way about any of the matters raised in those two paragraphs. Nothing to the contrary has been brought to my attention by either of the representatives. In my view the complaint made in the grounds of appeal about procedural unfairness in this regard is made out (see paragraphs 20 to 24 of those grounds).

23. Third, the Appellant's partner provided evidence at the hearing and in writing. There is no suggestion by the judge that she had deemed the

partner's evidence to be unreliable in any respect. However, the judge has failed to make any reference to this evidence when making her findings on the relationship between the Appellant and the partner and/or the relationship between the Appellant and the couple's son. Whilst it is true that a judge is entitled to look at the intentions of one party to a relationship (in this case the Appellant), all relevant factors must be taken into account when making that assessment. Clearly the supportive evidence of an apparently credible witness (the partner) must be a material part of that assessment.

24. Fourth, the judge rejects the evidence of three supporting witnesses because, in effect, they knew the Appellant (see paragraphs 86 and 87). Whilst connections to an Appellant may have a bearing on the weight to be attached to such evidence, it is an error simply to regard this evidence as being self-serving and therefore not to attach any weight thereto. The judge has given no independent reasons as to why she was not prepared to attach any weight to the witnesses' evidence.

25. Fifth, in my view the judge has failed to carry out any adequate assessment of the Appellant's relationship with his son. The judge has accepted the facts of paternity and cohabitation in respect of the Appellant, his partner and their son, but in reaching her conclusions at paragraph 89 she in effect finds that because the relationship between the Appellant and his partner was not genuine the same must apply to the relationship between the Appellant and his son. In the context of this case that is in my view inadequate.

26. For all of the above reasons I set aside the judge's decision.

Disposal

27. Both representatives agreed this case should be remitted to the First-tier Tribunal. I have had regard to the nature of the case, the relevant issues and paragraph 7.2 of the Practice Statement. There are a large number of matters which require detailed findings of fact in this case, not least the extent to which the Appellant is or would be perceived as being westernised and the nature of the relationship between the Appellant, his partner and their son. In addition the security situation in Afghanistan is ever-changing, and updated country information will need to be looked at in detail. In light of this the proper course is a remittal to the First-tier Tribunal.

28. The remitted hearing will be a complete re-hearing with no findings of fact preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors of law.

I therefore set aside the decision of the First-tier Tribunal.

I remit this appeal to the First-tier Tribunal.

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 their 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: 13 June 2017

Deputy Upper Tribunal Judge Norton-Taylor