



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/00704/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 18th January 2018

**Decision & Reasons
Promulgated
On 5th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

B M

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp of Counsel instructed by Lawrence & Co Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Aujla of the First-tier Tribunal (the FTT) promulgated on 17th August 2017.
2. The Appellant is an Afghan citizen born in 1983. His asylum and human rights application was refused on 27th April 2016. He appealed to the FTT. His appeal was heard on 8th August 2017.

3. The Appellant claimed that he feared persecution on the basis of his imputed political opinion as his father had been a commander in Hizb-i-Islami. The Appellant relied upon a report from Dr Giustozzi to verify some documents in support of his claim. When Dr Giustozzi's researcher contacted the police in Afghanistan, they confirmed that a warrant had been issued for his arrest and that he was wanted as a collaborator with Hizb-i-Islami, and also with the Taliban (something of which the Appellant had not previously been aware).
4. The FTT found, at paragraph 48, that the Appellant's account "is totally and utterly fabricated." The FTT found that the Appellant was not wanted by the authorities in Afghanistan for any reason, and he would be of no adverse interest to the authorities or anyone else on his return. The appeal was dismissed on all grounds.
5. The Appellant applied for permission to appeal to the Upper Tribunal relying upon four grounds which are summarised below.
6. Ground 1 contends that the FTT had not acted fairly in finding that the verification report of Dr Giustozzi was not truthful. This had not been part of the Respondent's case, and a previous hearing on 16th January 2017 had been adjourned to enable the Respondent to consider and respond to the verification evidence. There was no response. Dr Giustozzi stated that the documents had been authenticated by his researcher who had visited the police. The FTT recorded that there were no concerns about the integrity and profile of Dr Giustozzi, but the FTT did not have to accept the integrity of the researcher simply because he was working for Dr Giustozzi. The FTT described the researcher as not being subject to any professional control or supervision, regardless of the level of vetting that Dr Giustozzi may have carried out. The FTT did not accept that the letters issued by the authorities were genuine or authentic, and this was in the main because the authentication had been obtained by Dr Giustozzi's researcher.
7. The Appellant pointed out that the points relied on by the FTT were not relied on in the Respondent's refusal letter, were not raised in cross-examination, as it was never suggested to the Appellant that the evidence of the expert or his researcher was untruthful, and were not relied on in submissions made by Counsel for the Respondent. In addition the issues in relation to the expert report and the authenticity of the documents were not raised by the FTT with the Appellant or his Counsel.
8. It was contended that it is procedurally unfair for a finder of fact to conclude against a witness on a point that was never put. The Appellant did not have the opportunity of dealing with the FTT concerns about the expert report, as these concerns have never been made to the Appellant either by the Respondent or the FTT. For this reason it was submitted that the FTT materially erred in law and the decision must be set aside.
9. Ground 2 contends that the FTT made errors of fact in relation to undisputed evidence. It was contended that the expert report confirmed

that the Appellant is wanted by the police for collaboration with the Taliban and Hizb-i-Islami, that the Appellant learned of the accusation of collaborating with the Taliban from the expert, that the expert's researcher provided a curriculum setting out his qualifications and experience, and that there is a complete chain of custody from the Appellant's solicitors to Dr Guistozi, and to Dr Giustozi's researcher, to the police, and then back to the Appellant's solicitors. It was submitted that the FTT had approached the case without reference to these key facts.

10. Ground 3 contends that the FTT misapplied the burden and standard of proof. The FTT made a passing reference to the lower standard, but failed to demonstrate its application. It was submitted that the FTT had expressed more than just scepticism, but had expressed incredulity at the Appellant's account.
11. Ground 4 contends that the FTT failed to make reasoned findings on evidence, by making no separate or reasoned assessment of the evidence of the Appellant's cousin. It was submitted that it is inadequate to simply record that because the Appellant is not believed, the witness is also not believed.
12. Permission to appeal was granted by Judge Andrew of the FTT in the following terms;
 - “2. I am satisfied that it is arguable there are errors of law in the decision in that the judge has made findings against a witness, that is Dr Guistozi's agent, without the points being put to the person concerned. In particular I note that it was not part of the Respondent's case that the verification report was not truthful even after there had been an adjournment to allow the Respondent to respond to verification evidence, which she did not do. This may have led to errors of fact and thus arguable errors of law. Further, it is arguable the judge, in his wording in the decision, did not apply the correct standard of proof.
 3. I do not, however, find that the judge made no findings in relation to the Appellant's cousin's evidence. He refers to this at paragraph 35 of the decision.”
13. Following the grant of permission, there was no response from the Respondent pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
14. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FTT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

15. I firstly heard oral submissions from Mr Fripp who relied upon the grounds contained within the application for permission to appeal, and in particular Ground 1. Mr Fripp reiterated the point made in the grounds, that the Respondent had not questioned the authenticity of Dr Giustozzi's verification of the police documents, and it was confirmed that a warrant had been issued in respect of the Appellant.
16. It was submitted that the FTT had erred by making points in relation to Dr Giustozzi's evidence, which had not been made by the Respondent, and which had not been put to the Appellant at the hearing, and therefore the Appellant had been given no opportunity to address those points. I was referred in particular to paragraphs 44-45 of the FTT decision. The FTT had not accepted the integrity of Dr Giustozzi's researcher, although this had never been put in issue by the Respondent, and was not put in issue at the hearing. Mr Fripp submitted that the FTT erred at paragraph 44 in stating that the researcher was not subject to any professional control or supervision, as he fell within the bona fides of Dr Giustozzi. It was submitted that the finding by the FTT at paragraph 45 that the report by Dr Giustozzi could not be relied upon to show that the police documents were authentic, was materially unfair.
17. Mr Fripp submitted that the finding by the FTT that the report was not reliable, had coloured the perception of the FTT in relation to the remainder of the evidence. Therefore the decision of the FTT was unsafe, materially wrong in law, and should be set aside.
18. Mr Walker opposed the submission that the FTT decision must be set aside. He submitted that paragraph 43 must also be considered. Mr Walker commented that the FTT may have been in error in making adverse findings about Dr Giustozzi's researcher, but pointed out that in paragraph 43 the FTT had already expressed serious doubts about the authenticity and veracity of letters said to have been issued by the police in Afghanistan. Therefore the errors in paragraphs 44-45 were not material, given the findings that the FTT had already made at paragraph 43. I was therefore asked to find that as the errors were not material, the decision of the FTT should stand.
19. In response Mr Fripp submitted that the FTT had a duty to consider the evidence in the round. What was stated in paragraph 43 may have fallen away, were it not for the errors in paragraphs 44-45, in relation to the authentication of the police documents by Dr Giustozzi's researcher.
20. At the conclusion of submissions I reserved my decision, to reflect upon the oral submissions, and to consider again the FTT decision. Mr Fripp submitted that if an error of law was found, as contended on behalf of the Appellant, the FTT decision should be set aside with no findings preserved. On that issue, (if there was an error of law, which was not accepted), Mr Walker agreed.

My Findings and Conclusions

21. In my view the FTT erred in law as contended in Grounds 1 and 2. I accept that the Respondent's case was not that the verification report of Dr Giustozzi was not truthful. The Respondent was granted an adjournment of a previous hearing so that the verification could be considered. The Respondent did not provide any response in relation to that evidence.
22. I am persuaded that the FTT raised issues in relation to Dr Giustozzi's report, and in particular his researcher, that had not formed part of the Respondent's case, and which were not raised at the hearing, so that the Appellant and his Counsel did not have the opportunity to address the FTT on those issues. I accept that Dr Guitozzi's researcher had provided to the FTT a copy of his CV, which is at pages 41-42 of the Appellant's supplementary bundle, although there is no reference to this by the FTT.
23. It was conceded by the Respondent at the hearing before me, that the FTT may have erred as contended in Grounds 1 and 2, but it was suggested that because of findings previously made (see paragraph 43) the errors were not material. I find I am unable to accept that argument. The FTT must consider all the evidence in the round.
24. I therefore conclude that the FTT materially erred in law, and I accept the submission made by Mr Fripp that the finding in relation to Dr Giustozzi's report and authentication of documents, may have infected the view of the FTT in relation to other adverse credibility findings made against the Appellant. Therefore I conclude that the decision of the FTT is unsafe and cannot stand.
25. The decision needs to be re-made. I have taken into account paragraph 7.2 of the Senior President's Practice Statement which is set out below;

"7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless 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."
26. It is appropriate to remit this appeal back to the FTT, as there was procedural unfairness in the conclusions reached by the FTT in relation to the authentication of police documents, and no findings are preserved, therefore the judicial fact-finding which is necessary will be considerable, and it is more appropriate for that to be carried out by the FTT rather than the Upper Tribunal.
27. There will therefore be a further hearing before the FTT. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FTT Judge other than Judge Aujla.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

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

The FTT made an anonymity direction. That direction is continued. 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. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the Appellant has made a claim for international protection.

Signed

Date 19th January 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The Upper Tribunal makes no fee award. The issue of any fee award will need to be considered by the FTT.

Signed

Date 19th January 2018

Deputy Upper Tribunal Judge M A Hall