



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

Appeal Number: PA/02772/2018

THE IMMIGRATION ACTS

Heard at Manchester

**Decision & Reasons
Promulgated**

On 16 October 2018

On 08 November 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

**DM
[Anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms S Khan, instructed by Legal Justice Solicitors

For the respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Devlin promulgated 4.5.18, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 9.2.18, to refuse his claim for international protection.
2. First-tier Tribunal Judge Farrell refused permission on 31.5.18. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Finch granted permission on 16.7.18.

Error of Law

3. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside and remade by allowing the appeal.
4. In granting permission to appeal, Judge Finch found it arguable that when considering individual challenges to the credibility of the appellant's account the standard of proof applied was one in excess of that appropriate in asylum appeals. It was also considered arguable that although the appellant was aware that the respondent did not accept that he was a national of Afghanistan, it was not clear that it was put to the appellant that even if he was a national of Afghanistan he had not been living there at the time at which he claimed to have experienced persecution in the past. The suggestion that he had been living elsewhere was largely based on his use of the Gregorian calendar and amounted to no more than speculation.
5. It is not clear from the grant of permission whether Judge Finch found the ground arguable but it is also suggested in the grounds that the judge failed to adopt a holistic approach to the evidence and consider the totality of the evidence before reaching a decision on the appellant's credibility.
6. The grounds succinctly argue that the judge has applied the wrong standard of proof and should have applied the civil standard of a balance of probabilities when making a positive finding of fact against the appellant. It is also suggested that the judge failed to identify any positive evidence upon which to base the conclusion that the appellant had been absent from Jalalabad and probably Afghanistan for some time. It is also submitted that this finding is the central point on which the judge relied to reject the appellant's core factual claim of difficulties in Jalalabad and on which the risk of return and thus the outcome of the appeal turns. Finally, it is submitted the suggestion that the appellant had been absent from Jalalabad and/or Afghanistan for some time was never put to the appellant to enable him to respond.
7. Reliance is placed on K v SSHD (Afghanistan) [2002] UKAIT 04412, where the Upper Tribunal held that an appellant must prove his case to be reasonably likely but a positive finding of fact against him must be made on the balance of probabilities.
8. The respondent's case was that the appellant was not a national of Afghanistan. However, at [171] the judge concluded to the contrary, that he is a national of Afghanistan. Cogent reasoning is provided for that conclusion, set out in detail between [154] and [170]. It was common ground that the appellant is of the Sikh faith. At [174] the judge noted that

the respondent had conceded that if the appellant were found to be an Afghan national from Jalalabad, then his account of events leading to his departure from Afghanistan must be regarded as plausible. At [175] the judge accepted that the appellant's account cannot be said to be inherently plausible and on the contrary was "*of a type that might well happen in that country.*"

9. However, the judge went on to find at [179] that although an Afghan national, the appellant had been absent from Jalalabad and probably Afghanistan for some considerable time. Considering [176] to [178] it is clear that the primary reasoning for this conclusion lies in the appellant's preference at interview for Gregorian calendar and his apparent difficulty in recalling the Afghan calendar. However, in reaching this conclusion the judge also provided further reasoning at [180] to [182] before concluding at [183], "*Looking at everything in the round, I find that I cannot be satisfied, even to the lower standard of proof, that the appellant was present in Jalalabad or Afghanistan at the time of the events which, he claims, led to his departure from that country.*"
10. It was on that basis that the judge went on from [184] to reject at [185] the entirety of the factual claim as to events in Afghanistan. It is obvious that the risk on return assessment and other subsequent findings turned on this key finding.
11. Ms Khan also drew my attention to [203-204] of the decision where the judge stated that he may well have reached a different conclusion had the appellant produced one or other of the items of evidence the judge found to be missing. Had that been addressed, the judge stated "I may well have been inclined to accept his account of the events that he claims, led to his departure from Afghanistan. Had I accepted that account, I would have been obliged by the country guidance in TG that there would be an insufficiency of protection for him in Jalalabad, and I may well have concluded that it was unduly harsh to expect him and his family to relocate elsewhere."
12. At no point does the judge indicate that the absent evidence might or would have resulted in a different account. No opportunity was offered for the appellant's representatives to address the missing evidence or apply for an adjournment to obtain it.
13. Summarising the position, the judge drew an "*inference*" at [179] that the appellant had been absent from Jalalabad and probably Afghanistan for some considerable time, and at [183] was "*not satisfied, even to the lower standard of proof*" that the appellant was present in Jalalabad or Afghanistan at the time of the events he claims to have led to his departure from that country. I am satisfied that the judge was in error in applying the wrong standard of proof when making what amounts to a positive finding against the appellant. It is debatable whether the reasoning, relying heavily on the preference for the Gregorian calendar

was adequate. However, even if the reasoning had been adequate, the error on the burden and standard of proof is material to the outcome of the appeal as most of the remaining findings turned or followed on this conclusion.

14. I am also satisfied that it has been demonstrated that the judge was in error in reaching this finding of fact, regardless of the standard of proof. The appellant was fully aware that the respondent's case was that he was not a national of Afghanistan (50) and the extensive reasons set out between [28] and [49] of the refusal decision for that conclusion, including the appellant's inability to use the Afghan calendar and his reliance on the Gregorian calendar. However, the refusal decision did not make any distinction between whether the appellant is a national of Afghanistan and whether he might be of Afghan nationality but having left Afghanistan some considerable time ago. It was never put to the appellant that he was Afghan but had left Afghanistan a considerable time earlier.
15. In effect, the judge made a finding not contended for by either party to the appeal, that the appellant was a national of Afghanistan but had not lived there for some considerable time, perhaps explaining the unfamiliarity with the Afghan calendar. I am satisfied that this was a proposition that should have been put to the appellant and his representative but was not.
16. In the light of the foregoing I found that there was clear procedural unfairness to the appellant in the decision of the First-tier Tribunal so that the decision cannot stand. Mr Tan fairly conceded that the decision of the First-tier Tribunal was difficult to sustain as being fair to the appellant.
17. In submissions relating to the remaking of the decision, Ms Khan invited me to allow the appeal on the findings of the First-tier Tribunal. As noted above, the judge accepted at [204] that had the appellant left Afghanistan as a result of the plausible circumstances claimed, the judge would have allowed the appeal applying the country guidance of TG. My attention was also drawn to the findings that the appellant is an Afghan national at [172], and a Sikh [173], and the concession of the respondent made at the hearing and noted at [174] that if the appellant were found to be an Afghan national from Jalalabad, "then his account of the events that led to his departure from Afghanistan must be regarded as plausible." The judge followed this at [175] by effectively finding that his account was plausible as it was not implausible.
18. The only basis for not allowing the appeal was the judge's flawed conclusion that the appellant was of Afghan nationality but had left Afghanistan some considerable time ago. As stated above, this was never the respondent's case. I also note that it is largely based on the single issue of the appellant's preference for the Gregorian calendar and apparent unfamiliarity with the Afghan calendar. Once that unfairly made finding falls away, the positive finding that he is an Afghan national together with the concession and finding that his account of reasons for

leaving Jalalabad is plausible, there remains no other basis to reject the protection claim. Had the judge confined himself to finding that the appellant was a national of Afghanistan with a plausible account for leaving Jalalabad, and had not gone on to rely on a matter never put to the appellant and which was never the respondent's case there would be no reason not to apply the country guidance and find a risk that cannot be met by a sufficiency of protection or relocation within Afghanistan.

19. In the circumstances, I am satisfied that the correct course is to remake the decision in the appeal by allowing the appeal.

Decision

20. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. However, given the circumstances of this case, I make an anonymity order.

Direction Regarding Anonymity

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

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.



Signed
Deputy Upper Tribunal Judge Pickup

Dated