Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08481/2017**

THE IMMIGRATION ACTS

Heard at Newport	**Decision Promulgated**
On 2 November 2018	**On** 14 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

E M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Clark (counsel) instructed by Hoole & Co, solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. To preserve the anonymity direction deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 12 January 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 3 March 1997 and is a national of Afghanistan. On 17 August 2017 the Secretary of State refused the Appellant's protection claim. application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Hawden-Beal ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 8 February 2018 Judge Brunnen gave permission to appeal stating

> 1. By decision promulgated on 12 January 2018, Judge of the First-tier Tribunal Hawden-Beal dismissed the appellant's appeal against the respondent's decision to refuse his protection claim.
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> 2. The grounds on which permission to appeal is sought make several submissions concerning the Judge's finding that the appellant is not at risk from the Taliban or the government of Afghanistan. There is no arguable merit in these submissions, which amount only to an attempt to re-argue the appeal. The Judge gave clear and sufficient reasons for her findings.
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> 3. The grounds make further submissions concerning the respondent's stated intention of returning the appellant to Kabul. It is submitted that the Judge erred in finding that the appellant had failed adequately to deal with the issue of family support on his return and failed to consider whether it would be unduly harsh for the appellant to relocate to Kabul, as opposed to whether there is an Art.15(c) risk in Kabul. It is further submitted that the Judge failed to consider, for the purposes of the appellant's case under paragraph 276 ADE(1)(vi), whether there were very significant obstacles to his integration in Afghanistan. These points are arguable.

Rule 24 Response

5. On 13 March 2018 the respondent submitted a rule 24 response which says inter alia

> The respondent does not oppose the appellant's application for permission to appeal and invites the tribunal to determine the appeal with a fresh oral (continuance) hearing to consider paragraph 276 ADE and whether the appellant has family support in Afghanistan.

The Hearing

6. (a) For the appellant Mr Clarke adopted the terms of the skeleton argument he had prepared and took me through the procedural history of

this appeal. This case called before one of my confrere's on 10 September 2018. On that date my fellow Deputy Upper Tribunal Judge decided that the grant of permission to appeal was limited to arguments in relation to humanitarian protection and paragraph 276 ADE(1)(vi). That hearing was adjourned to enable the appellant's solicitors to make an application to extend the grounds of appeal to encompass arguments about asylum. The application was to be submitted not later than 25 September 2018 and has not been submitted.

(b) Mr Clarke referred me to Ferrer (limited appeal grounds; Alvi) [2012] UKUT 304 and argued that all the grounds of appeal require consideration. He asked me to set the decision aside in its entirety. He told me that the appeal goes to the Judge's assessment of credibility. He argued that none of the Judge's findings of fact can stand and a re-hearing of the appellant's case in its entirety is required in the First-tier Tribunal.

7. Mr Diwnycz for the respondent relied on the rule 24 response. He conceded that the decision contains a material error of law, and adopted a neutral position about the extent of the grant of permission to appeal. He asked me to set the decision aside.

Analysis

8. In Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304(IAC) the Tribunal held that (i) In deciding an application for permission to appeal to the Upper Tribunal a judge should consider carefully the utility of granting permission only on limited grounds. In practice, such a limited grant is unlikely to be as helpful as a general grant, which identifies the ground or grounds that are considered by the judge to have the strongest prospect of success. (ii) Where the judge nevertheless intends to grant permission only in respect of certain of the applicant's grounds, the judge should make this abundantly plain, both in his or her decision and by ensuring that the Tribunal's administrative staff send out the proper notice, informing the applicant of the right to apply to the Upper Tribunal for permission to appeal on grounds on which the applicant has been unsuccessful in the application to the First-tier Tribunal; (iii) (3) If an applicant who has been granted permission to appeal to the UT on limited grounds only applies to the Upper Tribunal on grounds in respect of which permission has been refused, the Upper Tribunal judge considering that application should not regard his or her task as merely some form of review of the First-tier Tribunal's decision on the application; (iv) In the IAC the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is unlikely to be advanced by adopting a procedure whereby new grounds of appeal can be advanced without the permission of the Upper Tribunal under rule 5 of those Rules.

9. It was established at the hearing until September 2018 that the wrong notice had been sent to the appellant informing him that permission to appeal was granted. The notice dated 22nd of February 2018 simply tells

the appellant that permission to appeal is granted. There is no mention of refusal of permission on some grounds. The terms of the grant of permission to appeal are that there is no arguable merit in submissions relating to asylum in the grounds seeking permission to appeal, but the Judge granting permission to appeal did not specifically refuse permission to move any of the grounds of appeal. The grant of permission to appeal is ambiguous and can be read as an unrestricted grant of permission to appeal.

10. I know that my view is differs from that of my fellow Deputy Upper Tribunal Judge, but no conclusion was reached on 10 September 2018. No directions were made on 10 September 2018 which limited the grounds of appeal, and no decision finding an error of law was made on 10 September 2018. In fairness to the appellant, I treat this hearing as an error of law hearing and consider each of the grounds of appeal.

11. The first eight grounds of appeal drive at the Judge's findings of fact in relation to the appellant's asylum claim. Five of those grounds of appeal are bald assertions that the Judge

> Was wrong to find that….

12. Those five grounds of appeal amount to nothing more than a disagreement with the facts as the Judge found them to be and an attempt to relitigate aspects of the case. Those grounds of appeal are directed at the Judge's finding that the appellant has been dishonest about his age. The application for permission to appeal sets out arguments based on the premise that the appellant is not challenging an age assessment and that the appellant does not actually know his date of birth.

13. At [30] of the decision the Judge notes that the appellant bases his belief about his age on what he was told by a maternal uncle, and that the appellant has not challenged an age assessment. The Judge does not take the appellant's belief about his age, or an age assessment which says that the appellant is older than he thought he was, as the foundation for the remaining credibility findings

14. The remaining grounds of appeal relating to the asylum claim suggest that the Judge erred in her approach to an expert report and that the Judge has not properly understood the background materials.

15. Between [3] and [7] the Judge summarises the respondent's reasons for refusing the appellant's claim. Between [8] and [16] the appellant's claim is summarised by the Judge. The Judge directs herself in law between [24] and [29]. The Judge's findings start at [30].

16. Between [31] and [36] the Judge explains why inconsistencies in the appellant's account damage his credibility. At [37] the Judge starts to consider the expert report prepared by Dr Foxley. Between [37] and [39]

the Judge compares Dr Foxley's opinion with the facts and circumstances of the appellant's account, and at [39] notes that Dr Foxley's conclusion is that the Taliban would have no interest in following the appellant to Kabul. At [38] the Judge correctly notes that the respondent intends to return the appellant to Kabul.

17. The Judge makes clear, sustainable, findings in relation to the appellant's asylum claim. The Judge clearly considers the experts report before reaching the conclusion that the appellant was not approached by the Taliban (at [34]). That finding removes the very foundation for the appellant's asylum claim and is a finding which is well within the range of reasonable conclusions that the Judge could reach on the evidence placed before the tribunal. An expert's report is simply an adminicle of evidence and does not replace the Judge's fact-finding role. The Judge correctly considered the expert's report as one strand of the totality of evidence and reached a sustainable conclusion, for which she gave adequate reasons.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

19. In relation to the asylum appeal, the Judge directed herself correctly in law. There is nothing wrong with the Judge's fact-finding. The grounds of appeal directed at the asylum claim amount to nothing more than a disagreement with the facts as the Judge found them to be.

20. All parties are agreed that the Judge applied the wrong test to internal relocation, and that her consideration of humanitarian protection and paragraph 276 ADE(1)(vi) is flawed. Parties agree that these are material errors of law. Consideration of article 8 ECHR grounds of appeal is limited to [44] of the decision. There, the Judge completely elides paragraph 276ADE(1)(vi) of the rules. That is a material error of law. At [43] the Judge manifestly applies the wrong test in law when superficially considering humanitarian protection. That is another material error of law.

21. Two months after the Judge's decision was promulgated the decision in AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118 became available. The Upper Tribunal held that having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the

population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout may other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul. However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within that general position. A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.

22. Mr Clark told me that he was not in a position to proceed to the second stage of the hearing. Even though those instructing him received directions that they should be ready for a hearing which could lead to a substituted decision, no rule 15(2A) notice has been served. He told me that it is hoped that an updated expert report can be obtained and that the appellant's evidence still needs to be updated. The result is that I do not have sufficient information to substitute my own decision.

23. The Judge's decision contains material errors of law in relation to humanitarian protection and paragraph 276 ADE(1)(vi) of the immigration rules. It does not contain errors in relation to the appellant's asylum claim.

24. In YZ (China) V SSHD [2017] CSIH 41 the Court of Session explained (at [42]) the basis on which the Upper Tribunal is entitled to interfere with findings of fact made in the First-tier Tribunal. An appeal lies on a point of law; there is no appeal against the judge's factual findings. In some cases (such as whether certain conduct is reasonable or proportionate or where the First- tier Tribunal has failed to take into account relevant matters or has taken into account irrelevant ones) the finding of an error of law in identifying what factors are to be taken into account may open up the findings available for reconsideration, including findings of apparently pure fact. However, when the Upper Tribunal remakes the decision, although it can make additional supplementary findings it does not have the power to overturn pure findings of fact which are not undermined or infected by any error of law.

25. I cannot substitute my own decision because the appellant solicitors were not prepared for the second stage of this hearing. A further fact-finding exercise is necessary solely in relation to humanitarian protection and paragraph 276 ADE(1)(vi). Because of the extent of the further fact finding necessary I remit the appeals of the First-tier Tribunal preserving the Judge's findings in relation to the appellant's asylum claim.

Remittal to First-Tier Tribunal

26. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if 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.

27. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. The Judge's findings in relation to the asylum appeal stand, but the remaining findings are set aside.

28. I remit the matter to the First-tier Tribunal sitting at Newport to be heard before any First-tier Judge other than Judge Hawden-Beal.

Decision

The decision of the First-tier Tribunal is tainted by material errors of law.

I set aside the Judge's decision promulgated on 12 January 2018. The appeal is remitted to the First-tier Tribunal so that the Humanitarian Protection and article 8 ECHR grounds of appeal can be determined of new.

Signed Date 8 November 2018

Deputy Upper Tribunal Judge Doyle