



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

Appeal Number: PA/10088/2017

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 14<sup>th</sup> January 2019**

**Decision & Reasons  
Promulgated**

**On 6<sup>th</sup> February 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**ABDUL HAMEED HUSSAINKHAIL  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: In person

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellant's appeal against the decision of Judge O'Neill made following a hearing at Bradford on 26<sup>th</sup> April 2018.

**Background**

2. The appellant is a citizen of Afghanistan. His date of birth was disputed but the judge found that the assessment from Kent County Council Child Services was reliable and that he was over 18 at the time of the hearing. There is no challenge to that decision.

3. The appellant arrived in the UK in May 2016 having fled Afghanistan in 2015 and travelling via a number of European countries to get here. He said that he would be at risk on return because he was threatened by the local Taliban who had delivered night letters to his family home stating that he had to join their ranks or be killed. His father had worked as a bodyguard for a leading politician, an MP who was assassinated in 2012, and had subsequently disappeared. In 2014 the appellant had been attacked by two men who had attempted to behead him but he had managed to escape.
4. The judge rejected the appellant's account in its entirety and found that the appellant was of no interest to the Taliban but in any event, could reasonably relocate to Kabul.
5. The appellant sought permission to appeal on a number of grounds which he drafted himself because although he was represented at the First-tier Tribunal he no longer had access to legal advice. He challenged the judge's conclusions that the letters from the Taliban were not genuine.
6. In a detailed decision, Designated Judge McCarthy rejected most of the points made by the appellant but did grant permission on the grounds that the judge had misdirected himself in relation to the Taliban letters.

7. Judge McCarthy wrote:

"The appellant begins by arguing that the three Taliban letters are real and Judge O'Neill was wrong to conclude otherwise. Judge O'Neill examined the three letters and at paragraph 36 gave good reasons for questioning their reliability. He decided that the pristine nature of the three letters was not consistent with the appellant's account about how they were delivered to his house in Afghanistan, kept and sent to him.

However, Judge O'Neill does not find the letters to be unreliable. He goes much further and at paragraph 38 he says they are not genuine. He reaches that conclusion based on a balance of probabilities. This finding raises concerns that the judge failed to apply the proper approach (see *Tanveer Ahmed*) and the wrong standard of proof (which should have been the lower standard). In addition, the judge appears to have forgotten the legal maxim, 'he who asserts must prove'. The respondent had not alleged that the documents were not genuine and it is arguable the judge has changed the case the appellant was required to answer."

8. On that basis he granted permission to appeal.

### **Submissions**

9. Mr Hussainkhail was of course hampered by a lack of legal representation. He did however say that there was no evidence that the letters were not genuine and that the respondent ought to have evidence to prove that they were false.

10. Mr Diwnycz accepted that the judge had erred and initially considered that the matter might have to be looked at again by the First-tier Tribunal but upon reflection submitted that any error was immaterial.

### **Consideration as to Whether there is a Material Error of Law**

11. The judge wrote at paragraph 38:

“I find that on the balance of probability these are not genuine but are letters purchased in Afghanistan to bolster up the asylum claim.”

12. Undoubtedly, for the reasons set out in the grant of permission the judge erred. Nevertheless I conclude that the error is not material.
13. First, the judge was entirely correct to apply Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in relation to the appellant, both in relation to his claims to be younger than he was and his failure to claim asylum at any of the numerous countries to which he travelled en route to the UK.
14. Second, the judge analysed the appellant’s evidence in relation to his escape from his attackers in 2014 in some detail and it was open to him to find that his account was implausible. The appellant said that he sustained significant injuries during the attack and yet, despite being in a seated position and on his own was able to escape from them running a considerable distance to the doorway of the family home. At that point it appears that the attackers fled. The judge was entitled to find that his account was not plausible. Moreover, he made the reasonable point that the attack took place in 2014 and yet the appellant did not leave Afghanistan for a further year.
15. The judge records that the assassination of the MP was information in the public domain. There was no evidence, other than the appellant’s evidence, which was unreliable, to connect his family with the MP.
16. He wrote:

“I have inspected what are said to be the original copies of the ‘night letters’ and they are all exactly the same in terms of quality of paper and print. They are in pristine condition and identical format. There is no evidence that they have been pushed under a door. There is no sign of aging or any differences between them in terms of signs of aging. There is absolutely no sign of wear and tear from being retained by the uncle, posted from Afghanistan to the UK, stored by the cousin, passed to the Appellant, stored by him until passed to the Home Office.”
17. There was therefore ample evidence upon which the judge could have concluded that the letters from the Taliban could not be relied upon to substantiate the appellant’s claim. Had he stopped at that point, and not

gone on to find that they were not genuine, he would have reached the same decision. The error is therefore immaterial.

**Notice of Decision**

18. The original judge did not materially err in law. His decision stands. The appellant's appeal is dismissed.

19. No anonymity direction is made.

*Deborah Taylor*

Signed

Date 4 February 2019

Deputy Upper Tribunal Judge Taylor