



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00743/2020

THE IMMIGRATION ACTS

Heard remotely at Field House via video (Teams)
On the 6th September 2021

Decision & Reasons Promulgated
On the 11th October 2021

Before

UPPER TRIBUNAL JUDGE BLUM

Between

HH
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr P Draycott, counsel, instructed by Hoole & Co Solicitors

For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Microsoft Teams. A face-to-face hearing was not held as all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Bonaverio (the judge) who, in a decision promulgated on 28 February 2020, dismissed the appellant's protection and human rights appeal against the

decision of the Secretary of State for the Home Department (“the respondent” or “SSHD”) dated 14 January 2020 refusing the appellant’s protection and human rights claim.

Background

2. The appellant is a national of Afghanistan, born on 5 July 1987 in the town of Gardiz, Paktia Province. He entered the United Kingdom on 8 April 2011 with entry clearance as a student. He made an application for further leave to remain, and this was ultimately refused on 25 August 2015 on the basis that the appellant used deception in obtaining a TOEIC English language certificate. An appeal against this decision was dismissed on 9 December 2015. The appellant was encountered on 2 August 2018 by immigration services and detained. He made an asylum claim on 11 August 2018.
3. I summarise the basis of the appellant’s protection claim. He began working for an NGO called Anway Amaan Construction Company (“AACC”) in July 2009 as a supervisor. He got married in the same year and, on 13 March 2011, a son was born. The appellant became a target for the Taliban as a result of his employment as the company as it undertook construction projects including the building of schools. The Taliban did not approve of this and threatened the appellant and his family. The appellant ultimately stopped working for AACC and left Afghanistan to study in the UK. The appellant maintains that the Taliban sent letters to the appellant’s family in 2013 and 2017 accusing him of continuing to work and threatening him. In February 2018 the appellant’s family were attacked and his father and brother shot, although they both survived. Then in June 2018 the Taliban threw grenades into the appellant’s family home killing his wife and one of his nephews. The appellant feared being returned to Afghanistan on the basis that he would be targeted by the Taliban.
4. The respondent did not believe the appellant gave a credible account of events that caused him to leave Afghanistan and refused his protection claim. The appellant appealed the respondent’s decision pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

5. The judge had before him a bundle of documents prepared by the appellant’s legal representative that included a statement from him and a statement from AG, who claimed to be the son of the cousin of the appellant’s mother (essentially a 2nd cousin). Both the appellant and AG gave oral evidence before the judge with the assistance of a Pashtu interpreter.
6. The judge did not find the appellant to be a credible witness. The judge did not think it plausible that the Taliban would attack the appellant’s family 7 years

after the appellant stopped working for AACC. The judge did not find it plausible that the Taliban would continue to send threatening letters to the appellant after he had stopped working for the AACC. The judge drew an adverse inference under section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2008 based on the seven-year delay in claiming asylum following the appellant's arrival in the UK. The judge additionally relied on the previous 2015 First-tier Tribunal decision which found that the appellant had obtained his TOEIC English language test by deception (albeit that the appellant did not attend the 2015 hearing). The judge expressed concerns in respect of a psychiatric report that was included in the appellant's bundle of documents. The psychiatric report was based on an interview of the appellant by the psychiatrist using a Dari interpreter on 12 February 2020 in Chelmsford. The appellant had however said in evidence that he spoke only a little Dari and that the interview with the psychiatrist took place in London. The appellant claimed that he travelled to the interview with AG and that they spent the night in Birmingham before the appointment, but AG claimed he had never been to Chelmsford and that, although he did recall travelling somewhere in the south of England with the appellant, they went straight there from Burnley (where the app was living). At [28] the judge stated:

"In all the circumstances I am not satisfied, even to the lower standard of proof, that the appellant did in fact attend an interview with Dr Singh on 12 February 2020 in Chelmsford. I therefore give Dr Singh's report no weight."

7. The judge was not consequently satisfied that the appellant had demonstrated that he faced a well-founded fear of persecution from the Taliban and his protection appeal was dismissed.

The challenge to the judge's decision

8. The grounds of appeal to the Upper Tribunal were poorly drafted and permission was refused both by the First-tier Tribunal and the Upper Tribunal. However, on 27 January 2021 Mr Justice Holman granted permission for the appellant to proceed in a judicial review of the Upper Tribunal's decision. Permission was granted by the Vice President of the Upper Tribunal on 21 April 2021. The grounds of appeal contend, inter alia, that the judge failed to engage with the appellant's explanation for the timing of his asylum claim, that the judge failed to make relevant findings in respect of the evidence given by AG, and that the judge's finding at [28] was not one open to him on the evidence considered as a whole.
9. The respondent provided a Rule 24 response which I have carefully considered, and the appellant's representative provided a skeleton argument. At the outset of the 'error of law' hearing I indicated my preliminary view to Mr Whitwell that there was merit in the above criticisms of the judge's decision. Mr Whitwell dealt with each of the three points and submitted that none of the criticisms undermined the sustainability of the decision and that the judge was entitled to

his conclusions. Having carefully read the decision and the supporting materials, and having full regard to Mr Whitwell's oral submissions, I indicated that I was ultimately satisfied that the decision did contain errors of law requiring it to be set aside.

Discussion

10. I have concerns with 3 aspects of the judge's decision. The 1st relates to the adverse inference drawn by the judge based on the admittedly significant length of time before the appellant made his protection claim. A delay of 7 years was unarguably significant and the judge would have been entitled to draw an adverse inference on the basis of the delay. The appellant had however provided an explanation for the delay. Firstly, in the psychiatric report (at 6.8) the appellant claimed he had not sought asylum because people had advised him that if he did so he would be deported. Then in his asylum statement (at paragraph 19) the appellant again claimed that he had been advised by many Afghan people that the Home Office refused everyone's case and that he would be returned to Afghanistan. He also stated that he had been hoping that the situation in Afghanistan would change. The judge failed to engage with these explanations. Whilst the judge may ultimately have been entitled to reject the explanations, the judge could not ignore them. I am satisfied that the judge failed to engage with relevant evidence and failed to make any finding of fact in respect of the explanation offered by the appellant for the delay in his asylum claim.
11. My 2nd concern with the judge's decision relates to the evidence from AG. In his statement AG claimed that, in or around 2010/2011, he had been informed that the appellant had started working with an NGO in Kabul and had been threatened by the Taliban. Whilst this information is hearsay, a point raised both in the respondent's Rule 24 response and by Mr Whitwell, AG's direct evidence was that it came to him in 2010/2011. If this evidence is accepted, it means that AG had been told as long ago as 2010/2011 that the appellant had been targeted by the Taliban. This is a factor capable of supporting the appellant's claim. AG also claimed in his statement that he visited Afghanistan in 2012 and was told again by his cousin that the Taliban continued to harass the appellant's family even though he had left Afghanistan. Once again, this evidence is hearsay, but the important point is that it was conveyed to AG, if his evidence is accepted, in 2012. AG's evidence is relevant because of the time the hearsay information was conveyed to him. AG then indicated in his statement that he travelled to Afghanistan in 2018 and that he met the appellant's father and brother who showed him the "shot scars on their legs." AG of course is not a medical expert and would be unable himself to determine whether the scars were caused by shootings, and the information, once again, was hearsay as it was reported by the appellant's brother and father. But the relevance of this aspect of AG's evidence is that he claims he was shown the scars and told they

were occasioned by an assault by the Taliban at a time before the appellant claimed asylum.

12. The evidence from AG was therefore clearly material. The judge however failed to engage with any of this evidence and failed to make any material findings of fact in respect of AG's claims. Whilst it may ultimately have been open to the judge to reject AG's evidence he was, at the very least, obliged to engage with that evidence, to make findings in respect of that evidence, and to provide adequate reasons for rejecting that evidence. The failure of the judge to do so constitutes, in my judgement, a material error of law.
13. My 3rd concern with the judge's decision stems from his approach to the psychiatric report. At [28] the judge appears to make a finding that the appellant did not actually attend an interview with Dr Singh. I acknowledge that there were some consistencies in the evidence before the judge relating to the language used in the consultation, where the consultation occurred and how the appellant and AG attended the consultation. Dr Singh is however a Consultant Psychiatrist in General Adult Psychiatry working in an NHS Trust. His report is detailed, containing a summary of his instructions, his interview with the appellant, and assessment of Health Records from Heathrow Immigration Removal Centre, and an assessment and diagnosis of the appellant's current mental health (the appellant was diagnosed as suffering from PTSD). If the appellant, as found by the judge, did not attend the interview with Dr Singh it is difficult to see how this report could have been produced. It is, quite frankly, an astonishing finding to make. The judge essentially found that the appellant did not attend an interview with the Consultant Psychiatrist and this necessarily, albeit implicitly, would have been held against his general credibility. Having regard to the Psychiatric Report and the information contained therein, I am not satisfied the judge was rationally entitled to conclude that the appellant did not attend an interview with Dr Singh.
14. For the reasons given above I am satisfied that the judge's decision contains errors of law rendering it unsafe.

Remittal to First-Tier Tribunal

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 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.

16. The judge's errors of law render the entirety of his credibility findings unsafe. In these circumstances there will need to be a full re-assessment of all the evidence rendering it appropriate to remit the matter back to the First-tier Tribunal for a full fresh (de novo) hearing, all issues open.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The case will be remitted back to the First-tier Tribunal for a de novo hearing before a judge other than Judge of the First-tier Tribunal Bonavero.

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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 *D. Blum*

Date: 6 September 2021

Upper Tribunal Judge Blum