



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

Appeal Number: AA/08728/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16th February 2018**

**Decision & Reasons
Promulgated
On 19th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**KJ
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Robertson, Counsel
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Paul dismissing his appeal on the basis of his application for asylum and humanitarian protection or protection of his human rights.

2. The Appellant was granted permission to appeal by Upper Tribunal Judge Chalkley. The grounds upon which permission was granted may be summarised as follows:

“I believe that the challenges set out at paragraphs 2.2.i and 2.2.ii of the renewed application are properly arguable, but I do not seek to limit the challenges. All issues may be argued.”

3. I was not provided with a Rule 24 reply from the Respondent before the hearing, however the Appellant’s representative had provided a skeleton argument for the purpose of today’s hearing, which parties had the chance to read before the hearing commenced.

Error of Law

4. At the close of the hearing I indicated that I did find that there was a material error of law in the decision such that it should be set aside, but that my reasons would follow. My reasons for so are as follows.
5. Although the parties were agreed there was an error, I was explicitly asked to set out the issues and the concessions made for the benefit of the First-tier Tribunal upon remittal and rehearing of this matter which I shall now do.
6. In relation to the challenges set out within the grounds upon which Judge Chalkley gave permission, and in relation to the other grounds, those may be summarised as follows. Firstly, the initial ground is a challenge to the adverse credibility findings and their rationality. The second ground relates to the First-tier Tribunal’s assessment of Article 15(c) to the extent that the assessment appears in the final paragraph of the decision under challenge.
7. Miss Roberston made the following submissions in relation to each of those matters.
8. Firstly, in terms of Ground 1 and the challenges to the adverse credibility findings, Miss Robertson’s submissions related primarily to the judge’s conclusion upon the Appellant’s credibility at paragraphs 52 onwards which were premised largely upon his previous assessment of the Appellant’s contact with his family in Pakistan/Afghanistan (their precise whereabouts being unknown) and the assessment of whether the Appellant was in touch with his brother in Italy and the manner in which they were able to maintain contact. At paragraph 46 the judge found against the Appellant in relation to his telephone’s contents (his telephone being produced for examination by the Tribunal) and the judge stated that the fact that it contained a number of telephone numbers in Afghanistan and Pakistan, and the Appellant’s statement that those people with Pakistani telephone numbers ‘all lived in Punjab’ was unconvincing. This was not least because “Of course, most of the people from Afghanistan who would have gone to Pakistan would have been in the Peshawar

District". In relation to those findings, Miss Robertson submitted that they lacked any rational basis. In short it was submitted that the finding was not based upon any background or objective evidence before the First-tier Tribunal and it must have emanated from the Tribunal Judge's own view which was not canvassed with the Appellant and the basis of this view was unknown to the parties to this appeal (although it was speculated that it could be a finding that arose based purely upon the geographic location of Peshawar in relation to the Afghan/Pakistan border). However, there was no way of knowing why the judge made that finding which played a key part in his assessment of the Appellant's claim.

9. Secondly, in relation to the whereabouts of the Appellant's family and the damage to his credibility from the fact that he was not in contact with them, the submission made by Miss Robertson again, in short, was that owing to the mass deportation of Afghan refugees to Afghanistan from Pakistan, this fact and the failure to factor it into the judge's assessment renders the assessment an incomplete one as this background fact could have affected the assessment of whether the Appellant would have lost contact with his family and the credibility of that account.
10. In relation to the sim cards and the phones of the Appellant's family, I was told that the Appellant's wife and father-in-law are Pakistani and they may have Pakistani sim cards, however the point was not explored further given that it may become relevant in a further hearing and it was not an issue before me.
11. Finally, in relation to the Appellant's brother and the adverse credibility finding that arose from the judge's finding that the Appellant's brother's phone details should have appeared on his phone, Miss Robertson submitted that the Appellant's brother had given clear evidence at paragraph 4 of his witness statement that he does not have a normal phone and that he used a Facebook Messenger App to communicate with his brother's solicitors in the United Kingdom. That being so, it was not apparent that the Appellant's brother should have had a mobile phone number and also that that mobile phone number would have appeared in the Appellant's phone necessarily. I observe that it may be that if the Appellant's brother in Italy is allegedly using a Facebook Messenger App, such an application could be used in a mobile phone without the benefit of a sim card as that mobile phone and the Facebook Messenger App could hypothetically function using Wi-Fi without the need for a sim card and a network connection.
12. In reply to those submissions, Mr Walker accepted that the First-tier Tribunal had indeed made assumptions in reaching its conclusions, an example of which appeared at paragraph 56 of the decision, regarding the migration of persons from Afghanistan to Peshawar as opposed to Punjab, and he accepted that the First-tier Tribunal had given its own view likely based on its personal knowledge perhaps, but that the source of the information and finding was unclear and did not emanate from either part in any event and was therefore unsafe overall. Mr Walker further

submitted that the discussion of the telephone numbers at paragraphs 46 to 47 showed that the judge had erroneously looked at the evidence with a reverse logic and the points raised by Miss Robertson did reveal major credibility challenges against the Appellant which would have affected the final credibility finding against him.

13. In the light of both parties' submissions, I accept that there is perversity in the credibility challenges made in the issues identified by Miss Robertson and accepted by Mr Walker as erroneous on behalf of the Respondent. Thus, the protection claim assessment is materially flawed and should be set aside.
14. Turning to the issue arising from Article 15(c) of the Qualification Directive and the assessment to the extent that it does appear in paragraph 56 of the judgment, whilst Miss Robertson accepted that the judge had mentioned a sliding scale factor in his assessment which would relate to the *Elgafaji* "sliding scale" approach, approved by the Upper Tribunal, the First-tier Tribunal had however gone on to state further in the same paragraph that the Appellant could "only succeed on the basis that he is able to show, following the principles set out in the case of *N*, that return to Afghanistan would breach his Article 3 rights". Miss Robertson submitted that the Appellant had never advanced an Article 3 medical claim and that the same was not reflected at paragraph 12 of her skeleton argument before the First-tier Tribunal which discussed Article 15(c), which was an autonomous concept, separate and distinct from Article 3. Miss Robertson further submitted that despite the mention of the sliding scale there was no ostensible attempt to apply the principle, and that principle required an assessment of all the personal circumstances of the Appellant before considering whether there was any risk of harm compared to an ordinary civilian. Thus the examination by the First-tier Tribunal of the medical evidence in isolation, and without consideration of the list of factors mentioned in the skeleton argument at paragraph 26 before the First-tier Tribunal, meant that the assessment was incomplete.
15. In reply to this Mr Walker accepted that the First-tier Tribunal had indeed used the wrong test at paragraph 56 and he accepted the errors as identified by Miss Robertson.
16. I agree with the submissions of Miss Robertson and Mr Walker and I agree it is right to concede this point as the assessment at paragraph 56 does not mention the Article 15(c) claim at all, and given its omission on the face of the decision in its entirety, that omission would unquestionably be a fatal one to the lawfulness of the decision on that same topic.
17. Finally, in terms of Ground 3 Miss Robertson in turn rightfully conceded that the *Paposhvili* ground was no longer being pursued and so I do not go on to consider that.

18. Thus, taking all of these matters as a whole, in my view the first and second grounds do reveal sufficient flaws such that a material error of law is identifiable in the decision with the result that it should be set aside.

Notice of Decision

19. The appeal to the Upper Tribunal is allowed. The making of the previous decision involved a material error of law and is set aside in its entirety.

Directions

20. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

21. This appeal is to be directed for the attention of the **Resident Judge at IAC Taylor House** for any further case management. In that regard, given that this appeal is of several years vintage and has proceeded and several hearings have taken place before the First-tier Tribunal without any final outcome to the appeal, it is my suggestion that this appeal be listed before either the Resident Judge at IAC Taylor House or another judge chosen by him of sufficient seniority.

Anonymity

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

22. Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their 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.

Signed

Date 18 March 2018

Deputy Upper Tribunal Judge Saini