Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10577/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Wednesday 24 March 2021	**On Wednesday 07 April 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

F S
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Although an anonymity order was not made by the First-tier Tribunal, this is an appeal on protection grounds. It is therefore appropriate to make that order. Unless and until a Tribunal or court directs otherwise, the Appellant (as she was in the First-tier Tribunal) is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms J Fisher, Counsel instructed by Malik and Malik Solicitors

DECISION AND REASONS

BACKGROUND

1. The Secretary of State is the appellant in this appeal. For ease of reference, however, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Daldry promulgated on 19 October 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 21 October 2019, refusing her protection and human rights claims.

2. The Appellant is a national of Afghanistan. She came to the UK on 12 March 2015 with leave to enter to 1 December 2017 as the spouse of a British citizen. Her husband is of Afghani origin. They met in Afghanistan in 2012 and married there in 2014. On 30 November 2017, the Appellant applied for further leave. That application was refused on the basis that her husband did not meet the financial requirements of the Immigration Rules.

3. On 9 August 2018, the Appellant claimed asylum. She claimed to be at risk on return as a lone woman. The Respondent refused that claim on the basis that the Appellant still has family in Afghanistan or in the alternative could return with her husband who would therefore support her. The Respondent asserted that the Appellant's family life with her husband could be expected to continue in Afghanistan.

4. As I will come to below, at some point following the refusal of her claim and lodging of appeal, the Appellant modified her protection claim. For ease of reference, I refer to that hereafter as "the New Claim". The Appellant now claims that there is a specific risk to her on return due to the association which her brother, [D], has with prominent figures in Afghanistan. As a result, it is said that [D] is at risk from the Taliban and that the Appellant and her husband (if he chose to accompany her on return) would be at risk due to their association with [D]. The Appellant claims that her sister has had to leave Afghanistan following the disappearance of the sister's husband. It is suspected that his disappearance may be linked to a perceived association with [D].

5. The Judge accepted the New Claim as credible. She found therefore that the Appellant would be at risk on return to Afghanistan. She also found that the Appellant would be at risk on return as a lone woman (in other words on the basis of her original claim) but including on the basis that the Appellant's husband could not be expected to accompany her as he too might be put at risk due to his association with [D].

6. The Respondent challenges the Decision on three grounds as follows:

   Ground one: The New Claim amounts to a "new matter". The Judge was therefore precluded from dealing with it, absent consent of the Respondent.

   Ground two: The Judge has failed to make a finding about an inconsistency in the New Claim in relation to the obtaining of documents from Afghanistan.

> Ground three: The Judge has failed to note that the Appellant's husband has returned to Afghanistan on two occasions when determining that he would be at risk and therefore could not accompany the Appellant. Further, the Judge has failed to have regard to the country guidance in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC) ("AS (Afghanistan)") concerning the reach of the Taliban in Kabul.

7. Permission to appeal was granted by First-tier Tribunal Judge Adio on 16 November 2020 in the following terms so far as relevant:

> "... 2. With regards to the issue of the judge erring by dealing with a matter which had not been raised previously and should not have been dealt with, the Respondent was at the hearing to object if it was perceived that any matter was a new matter. There is nowhere in the determination where the judge records that such occurred, that this was not part of the Applicant's case. With regards to the second issue the inconsistencies concerning the Applicant's claim to have obtained her brother's documents by WhatsApp, the Respondent raises the issue that the judge has not resolved this matter in view of the fact that the Applicant claims to have lost contact with the brother. Furthermore, with regards to the issue of the Applicant not being able to return with her husband because he too would be at risk due to his association with the Applicant's brother, the Respondent points out that the Applicant's husband has returned to Afghanistan on two occasions with no reported problems.
> 3. It was submitted that there are no adequate reasons given for the findings. The cumulative grounds of matters referred to at paragraphs 35 and 52 raise an arguable error of law as they are crucial to the findings that the Applicant would face risk on return. In the interests of justice and grounds of fairness permission is also granted to deal with the ground on whether a new matter should have been raised with regards to the Applicant being at risk of persecution in Afghanistan due to her association with her brother [D] since it affects the final outcome of the appeal. Permission to appeal is granted."

8. The Appellant filed a Rule 24 response dated 3 December 2020. It is said that Judge Adio refused permission on ground one. That is not the case. First, the operative part of a decision in response to an application for permission to appeal is the decision and not the reasons for it. The decision does not indicate any limited grant. Further, it is clear from the penultimate sentence of the reasons that the Judge did not intend to limit the grant of permission. It is also said in response to this ground that the Respondent was on notice as to the New Claim in July 2020 and had ample time to respond to it.

9. In relation to ground two, the Appellant points out that the Respondent did not challenge the authenticity of the documents. What was important was the credibility of the Appellant and her husband. It is said that there was no material challenge to their credibility. In essence, the Appellant says that the Judge was entitled to reach the findings she did based on the testimony of the witnesses and the documents.

10. In relation to ground three, the Appellant points out that her husband had returned to Afghanistan only in 2012 and 2014 prior to the events giving rise to the claim based on

association with [D]. The Appellant points out that the Judge considered safety of relocation to Kabul but noted that the guidance in AS (Afghanistan) was concerned with single adult males and not women.

11. By a Note and Directions dated 30 November 2020, Upper Tribunal Judge Pitt indicated that it might be appropriate to determine the error of law issue without a hearing. The parties were invited to provide observations on that course. The Appellant objected. So it was that the hearing came before me as a remote hearing via Skype for Business. There were some initial difficulties with Ms Fisher's connection. However, once that was resolved, the hearing proceeded without technical difficulties. I had before me a bundle of the core documents relating to the appeal, and, thanks to Mr Clarke's efforts, the Appellant's original and supplementary bundles.

12. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

13. I deal with each of the grounds in turn.

Ground One

14. I did not understand Ms Fisher to suggest that the New Claim did not amount to a "new matter". I therefore begin with the importance of that issue for the lawfulness of the Decision.

15. Section 85 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") ("Section 85") sets out the matters which the Tribunal can consider when hearing an appeal. Since the changes to the appeal regime made by the Immigration Act 2014, Section 85 has included the following provisions:

> "(1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
> (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 against the decision appealed against.
> (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
> (4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.
> (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
> (6) A matter is a "new matter" if—
> (a) it constitutes a ground of appeal of a kind listed in section 84, and
> (b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision mentioned in section 82(1), or
(ii) a statement made by the appellant under section 120."

16. Section 86 of the 2002 Act provides that on an appeal, the Tribunal "must determine ... any matter raised as a ground of appeal ... and ... any matter which section 85 requires it to consider". That then sets out the limits of the Tribunal's jurisdiction.

17. What constitutes a "new matter" was considered by this Tribunal (Vice-President and UTJ Jackson) in Mahmud (S.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC) ("Mahmud"). The headnote reads as follows:

> "1. **Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal** and the First-tier Tribunal must therefore determine for itself the issue.
> 2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. **A matter is the factual substance of a claim.** A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
> 3**. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive**."
> [my emphasis]

18. It cannot sensibly be suggested based on the guidance given in Mahmud that the New Claim was not to be categorised as a "new matter". The Appellant's original claim was a general one based on her membership of a particular social group, namely lone women in Afghanistan. Although the presence of the Appellant's brother [D] was relevant to that claim, the Respondent having raised this as reason why the Appellant would have support on return, the Appellant at that time said that she had little contact with him. His presence in Afghanistan and her association with him formed no part of any claimed individual risk to her. I did not understand Ms Fisher to argue to the contrary.

19. What is said in the Rule 24 response and Ms Fisher's submissions concerned the factual background to the raising and Respondent's reaction to the New Claim. It is said in the Rule 24 response that the New Claim was raised by the Appellant with the Respondent in July 2020. I accept that the detail of the claim and the documents relating to it are in the Appellant's original bundle. I was told that this was served on the Respondent in July 2020. Mr Clarke did not dispute that.

20. Mr Clarke also accepted, as said in the Rule 24 response, that there was a CMR in the appeal in August 2020. He informed me based on a note made by the Presenting Officer who attended that hearing that the "new matter" issue had been raised at that hearing but the Judge dealing with the CMR indicated that this was a matter for the

Judge at the full hearing (consistently with the guidance given in Mahmud). The order made following the CMR does not take matters any further in that regard. Both representatives also accepted that there was a hearing of this appeal listed in September 2020, but Mr Clarke said this had to be adjourned due to a lack of an interpreter.

21. It was not suggested, however, in either the Rule 24 response or Ms Fisher's submissions that the New Claim had ever been formally raised with the Respondent by way of a section 120 statement. Mr Clarke was unable to find one on file. There is none in the Appellant's bundles. Even if the New Claim was formally raised in that way, the issue under Section 85 is not whether the Respondent has had the opportunity to deal with it but whether she has consented to it being raised. I also observe as an aside that, whilst a period of a few months might well be sufficient in usual circumstances for the Respondent to consider new facts and produce a supplementary letter in response, that is not necessarily the case in the current climate, given the impact of the pandemic. Again, in any event, the issue is not whether the Respondent has responded to the "new matter" but whether she has consented to it being dealt with by the Tribunal in the appeal.

22. Returning to the issue of consent, as Judge Adio pointed out when granting permission, the Respondent was represented at the hearing before Judge Daldry. There is no indication in the Decision that the Presenting Officer raised the issue whether the New Claim amounted to a "new matter". Mr Clarke conceded that the note made by the Presenting Officer did not indicate that any submission had been made in that regard. Ms Fisher submitted that, on that analysis, there was tacit consent.

23. I begin my consideration of what constitutes consent in this context with what is said in Mahmud as follows:

> *"The Secretary of State's consent to the Tribunal to consider a new matter, section 85(5)*
> 33. The second part of construction with which we have to deal is the meaning of consent in section 85(5) of the 2002 Act. A Tribunal may consider new matters if the Secretary of State has given the Tribunal consent to do so.
> 34. Mr Chelvan submitted that the procedure to give or withhold consent is contained within rule 24 of the Procedure Rules, which itself acts as a gatekeeper to ensure equality between the parties. Emphasis was placed on rules 24(2) and (3) which are said to contain a mandatory requirement for the Respondent to provide a statement in opposition to all matters, specifically including those raised in box E of the notice of appeal form (the new matters section). This requires a reading of rule 24(2) to include a requirement that if the Respondent takes the view that something raised in the notice of appeal is a new matter governed by section 85(5) and (6) of the 2002 Act, she is obliged to indicate that and to indicate if she intends to withhold consent.
> 35. It was further submitted that the failure to file such a statement means that by omission, the Respondent does not oppose the new matter being raised in the appeal notice and is deemed by that conduct to have given consent for the new matter to be considered by the First-tier Tribunal. Reliance was placed on the Upper Tribunal's decision in MH (Respondent's bundle: Documents not provided) Pakistan [2010]

UKUT 168 to support the submission by analogy with a situation where the Respondent was found to have been required to submit a document to the Tribunal in accordance with a different requirement in former rules (rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005) which was designed to ensure that an appellant knew the case that he had to meet on appeal. It was held in that case that the tribunal was entitled to conclude that a document not furnished under that rule was not a document on which the Respondent relied.

36. First, we express caution in using procedure rules as an aid to statutory construction generally and specifically for the purpose construing the meaning of 'consent' in section 85(5) of the 2002 Act. The procedure rules govern the procedure to be applied to matters that are before the Tribunal to determine in an appeal, whereas in the present situation, **the effect of section 85(5) is that the Tribunal has no jurisdiction to consider a new matter.** Procedure rules governing determination of an appeal can therefore offer little if any assistance on the interpretation of statute which determines the jurisdiction of the Tribunal itself. Secondly, we do not consider that rule 24 contains any such mandatory requirement on the Respondent in relation to consent for new matters. Thirdly, in any event, **it would be contrary to the clear language in section 85(5) requiring the Secretary of State to have given consent, to find that by means of procedural rules, deemed consent can be inferred by inaction. Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied.**

37. Rule 24(2) expressly states that the Respondent must, if the Respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the Respondent opposes the appellant's case and the grounds for such opposition (emphasis added). The requirement to make a statement is clearly conditional. **The condition that the Respondent wishes to change or add to the grounds reasons relied upon, does not include any requirement to make a new decision on a new matter identified in the notice of appeal or in a section 120 notice, nor to indicate if consent is withheld for such a new matter to be considered by the Tribunal.** The decision in MH (Pakistan) is not applicable to the present case which significantly differs on its facts as to the type of document or statement in issue. MH (Pakistan) was concerned with a failure to submit a specified document in the old rule 13, such that the document could not be relied upon by the Respondent. Rule 24 does not require the Respondent to make any statement or new decision as to new matters raised by an appellant which is qualitatively different to the failure to submit an existing document used at the time of the decision.

38. Further it appears that if the Respondent had made a statement pursuant to rule 24, the effect would inevitably be that the matter would not be a 'new matter' because it had in fact been considered by the Respondent in the context of the decision under appeal and would therefore not meet the definition in section 85(6)(b)(i) of the 2002 Act. The construction of rule 24 contended for by the Appellant would have the result of rendering section 85(5) of the 2002 Act devoid of any application in practice.

39. Mr Chelvan made further submissions as to whether there was in place an appropriate procedure for the Respondent to give or withhold consent to the First-tier Tribunal to deal with a new matter if rule 24 was not applicable. Relevant to these submissions are the contents of the Respondent's policy 'Rights of Appeal' version 3, which sets out guidance for those acting on behalf of the Respondent as to how to handle 'new matters'. This includes when any 'new matter' should be considered, before the appeal hearing if possible and if not at a CMR or substantive appeal hearing; together with guidance on the process of giving or refusing consent. There

was no specific challenge to the contents of this part of the guidance, only to the effect that it had not been complied with by the Respondent in the present appeal.

40. There is no dispute between the parties that the Respondent has not followed the process for refusing consent set out in the guidance in this case as no written reasons have ever been provided for the refusal. However, that is not a matter which assists this Appellant in the context of this statutory appeal and it cannot constitute a ground of appeal which can be pursued in this Tribunal. A failure by the Respondent to follow her own guidance is a public law issue which could potentially be challenged by an application for Judicial Review but that is outside the scope of this appeal. We do not consider that this raises any issues of procedural fairness in the conduct of a statutory appeal and **unless and until the Respondent expressly gives consent for the consideration of a new matter by the Tribunal, an appellant must be aware the issues may not be considered.** There is no power for the First-tier Tribunal, or the Upper Tribunal to determine whether the Respondent has appropriately for fairly withheld consent: again that is a matter only challengeable in Judicial Review proceedings on public law grounds."
[my emphasis in bold]

As that passage makes clear, particularly at [36], consent cannot be implied. Consent must be express. What is said by the Tribunal, although not part of the headnote for which the case is reported, does not assist the Appellant.

24. Ms Fisher alluded in her submissions to the Tribunal's decision in Qaidoo (new matter: procedure/process) [2018] UKUT 87 (IAC) ("Qaidoo"). I have therefore considered the decision in that case also. The headnote reads as follows:

> "1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and, in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter
> 2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review."

25. The headnote in Qaidoo makes the point, consistently with what is said in Mahmud, that it is for the Tribunal to determine whether something is a new matter and, thereafter, to consider how to deal with the appeal procedurally in order to obtain the Respondent's consent. Whilst one may have sympathy with a Judge who proceeds without being put on notice by either party that the claim which she is being asked to consider is a "new matter", Section 85(5) is a restriction on the Tribunal's jurisdiction. Whether the Judge is aware of that restriction or not is not the issue. The issue is whether that restriction applies and therefore whether the Judge was entitled to determine the New Claim at all, at least absent consent. The decision in Qaidoo does not assist at all in relation to what constitutes consent for these purposes. I have not been able to find any authority for the proposition that a failure by the Respondent to object to an appellant raising a new claim which amounts to a new matter is to be

assumed to be consent. As was said in Mahmud, the Respondent is required to consent to the consideration of the "new matter" expressly.

26. As Mr Clarke also submitted and I accept, there is good reason for Section 85(5). If the Respondent has not dealt with a "new matter" previously and has not considered whether, for example, to interview an appellant again or provide a supplementary letter dealing with it, a Judge is placed in the position of being the primary decision-maker, as happened here. The Judge then has to decide the claim with no prior input from the Respondent who bears the initial task of deciding whether to recognise an asylum applicant as a refugee.

27. For those reasons, ground one is made out. The New Claim is on any view, in light of the guidance in Mahmud, a "new matter". The Respondent had not consented to the Judge determining the New Claim. Whilst I accept that the Respondent did not object to the Tribunal dealing with the New Claim, the jurisdiction of the Tribunal is limited by statute. Its jurisdiction cannot be extended by agreement between the parties. If the Respondent had been asked by the Judge whether she objected to the Judge determining the New Claim and the Respondent had answered in the negative, the position may well have been different. That response could be seen as an express consent to the determination of the New Claim. That is not however what occurred here. I am therefore satisfied that the Judge erred by determining the New Claim.

28. Ms Fisher did suggest that this error made no difference because the Judge had also allowed the appeal on the basis of the original claim, namely that the Appellant was at risk on account of returning to Afghanistan as a lone woman.

29. I reject this submission. I accept that the Judge considered the position for lone women as such at [55] to [58] of the Decision. I accept also that, in so doing, she took into account what is said in AS (Afghanistan) at [57] and [58] of the Decision. I would not, for that reason, have found the Respondent's ground three to be made out.

30. However, following the consideration of the position for lone women, the Judge's conclusion at [59] of the Decision reads as follows:

> "59. It is my finding, for the reasons stated above, that if the appellant is returned to Afghanistan, then she would be returned as a lone woman **as it would not be safe for her husband to return with her because he too would be affected by the risk associated with [D] and his activities.** If the appellant is returned to Afghanistan as a lone woman then **she is at even greater risk because she will be exposed to a real risk of persecution due to her brother [D]** who is known to the Taliban through his associations with high profile individuals. She would also be at risk for being a lone woman set out in the case of **AK**."
> [my emphasis]

31. Whilst that final sentence might suggest that the Judge was finding a general risk to the Appellant based on being a lone woman without more, that ignores the first part of the paragraph dealing with why the Appellant's husband could not also return with her. I

accept as Ms Fisher submitted that he cannot be removed to Afghanistan. He is a British citizen. He may not wish to go. However, the Judge would at the very least have to consider whether he would do so even if not also whether it would be reasonable to expect him to do so. The Judge did not carry out that analysis because she had concluded that the Appellant's husband would be at risk due to the association with [D]. For that reason, he could not be expected to return. As an aside, the point made by the Respondent in her ground three has no merit. The Appellant's husband had returned to Afghanistan only in 2012 and 2014, well before the events arising from association with [D] were said to have arisen.

32. The finding that the Appellant would be at risk as a lone woman is also impacted by the Judge's finding in relation to [D] himself. The Respondent had taken the point that the Appellant could look to her family members in Afghanistan for support on return. That included [D] as well as her sister who she said had fled Afghanistan following the threats arising from association with [D] and the disappearance of her own husband. The availability of support for the Appellant from other family members is however directly impacted by the credibility of the New Claim. The Judge obviously did not consider the option of support from other family members due to her finding on the credibility of the New Claim.

33. For those reasons, the error disclosed by ground one is one which affects the outcome of the entire appeal. For that reason, I set aside the Decision in its entirety with no findings preserved.

34. In light of the nature of the error found, I do not need to deal with grounds two and three. I have made some observations in relation to ground three above. Were it not for the error disclosed by ground one, I would not have found an error disclosed by ground three. Ground two is perhaps more nuanced. However, since the credibility of the New Claim will need to be reconsidered entirely afresh there is no need for me to deal with this ground.

35. In light of the nature of the error I have found (that the Judge had no jurisdiction to determine it), and since the credibility of the New Claim must be considered entirely afresh, I consider it appropriate to remit this appeal for redetermination. Both representatives agreed that this is the appropriate course. The reason which lies behind the error found is that the Respondent has not given consent for the New Claim. The First-tier Tribunal will therefore need to consider the appropriate procedural course to ensure that consent is considered and if appropriate given prior to redetermination of this appeal.

CONCLUSION

36. For the foregoing reasons, I am satisfied that there is an error of law disclosed by ground one. The Judge was not entitled to deal with the New Claim absent the Respondent's consent. That consent was not given. For that reason, the Decision is set aside, and the appeal is remitted to the First-tier Tribunal for redetermination. The

issue of the consent required for the New Claim needs to be considered prior to the re-hearing of this appeal.

DECISION

The Decision of First-tier Tribunal Judge Daldry promulgated on 19 October 2020 involves the making of an error on a point of law. I therefore set aside the Decision and remit the appeal for re-hearing before a Judge other than Judge Daldry.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 30 March 2021