



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-000976
PA/50849/2021; IA/02780/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 1 July 2022**

**Decision & Reasons Promulgated
On the 01 September 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**MR (AFGHANISTAN)
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr. M Allison, Counsel, instructed by Turpin & Miller LLP
For the Respondent: Mrs. A Nolan, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of Judge of the First-tier Tribunal Hosie, sent to the parties on 21 October 2021, dismissing his appeal on international protection and human rights (article 8) grounds.
2. The underlying appeal arises in respect of a fresh claim decision issued by the respondent on 28 January 2021.

Anonymity

3. The Judge issued an anonymity order by means of her decision and neither representative before me requested that it be set aside.
4. Observing that the appellant seeks international protection, I am presently satisfied that the order should properly continue and re-affirm it above.

Facts

5. The appellant is a national of Afghanistan. He was apprehended by the United Kingdom authorities on 10 April 2009 and stated that he had arrived in the country two or three days previously. The following day he claimed asylum. The respondent refused the asylum claim on 6 November 2009. The appellant did not exercise his appeal rights in time and when he finally lodged an appeal on 11 February 2010 it was rejected as being out of time.
6. The appellant served fresh representations on 20 June 2012 and the respondent accepted them as constituting a fresh claim under paragraph 353 of the Immigration Rules ('the Rules') by a decision dated 28 September 2012. Though the respondent did not grant the appellant refugee status by means of her refusal decision the appellant enjoyed a right of appeal to the First-tier Tribunal, which he exercised (AA/09153/2012).
7. His appeal was initially refused by the First-tier Tribunal on 18 December 2012, but the Upper Tribunal set aside the decision of the First-tier Tribunal by a decision dated 7 March 2013. Deputy Upper Tribunal Judge Davey dismissed the appellant's appeal by a decision sent to the parties on 30 January 2014, concluding that upon application of the low standard of proof there was not a real likelihood of the appellant being persecuted either by the then government or by non-state agents such as the Taliban or Hizb-i-Islami.
8. The appellant served further fresh representations upon the respondent on 28 March 2018 and respondent accepted them as constituting a fresh claim under paragraph 353 of the Rules, but they were not considered capable of requiring a grant of status. By means of his further representations, the appellant maintained his fear of the Taliban. He provided warning letters confirming that the Taliban were looking for him, asserting that his uncle was killed by the Taliban, who left a letter for him:

and then a second warning letter was issued. He relied upon a report from village elders stating that his life would be at risk if he returned to Afghanistan.

9. The respondent's decision detailed, *inter alia*:

'Zaman Hashmi claims that he brought the letters from the elders home for you along with the two warning letters from the Taliban on his return from Afghanistan in 2017. He has provided a copy of his passport with visa stamp dated 21/10/17. Whilst it is accepted that Zaman Hashmi has travelled to and from Afghanistan, there is no evidence to support him obtaining a letter from the elders in your village, no communication from his cousin who actually obtained the documents and also no evidence to indicate where he obtained the warning letters from. It is noted that one of the warning letters is dated 2011 and the other 2015, however no evidence has been provided to demonstrate how this letter was obtained and where it has been stored for six years and two years retrospectively (obtained in 2017). Therefore, little weight is attached to this piece of evidence.'

First-tier Tribunal Decision

10. The appeal came before the Judge sitting at Hatton Cross on 20 September 2021. The appellant and his witness, Mr. Hashmi, gave evidence and were cross-examined.

11. The appellant's appeal was dismissed by the decision sent to the parties on 21 October 2021.

Grounds of Appeal

12. Four grounds of appeal were originally advanced, identified as:

- i) The First-tier Tribunal erred in requiring corroboration.
- ii) The First-tier Tribunal gave insufficient reasons when asserting that the claimed use of a "warning letter" was incompatible with background evidence.
- iii) The First-tier Tribunal erred by giving insufficient reasons for its conclusion that Afghanistan was safer, only a matter of weeks after the Taliban retook control of the country.
- iv) The First-tier Tribunal erred in giving insufficient reasons in respect of its article 8 decision.

13. By means of a written application, dated 30 June 2022, the appellant sought by supplementary grounds of appeal to raise a fifth ground of challenge, namely that the First-tier Tribunal erred in law by only considering the risk on return based on 'voluntary return', as opposed to 'enforced return'. Reliance was placed upon the recently reported decision in *SA (Removal destination; Iraq; undertakings) Iraq* [2022] UKUT 00037 (IAC). Mr. Allison accepted in respect of ground 5 that he was required to persuade the Tribunal to extend time in which to file the ground of appeal.

14. Permission to appeal on the first four grounds of appeal was granted by Upper Tribunal Judge Plimmer by means of a decision dated 19 January 2022.

Analysis

15. I allowed the appellant's appeal orally at the hearing, confirming that I would give my written reasons later. I do so now.

International protection

16. I take this opportunity to observe that it is clear to me the Judge sought to take considerable care when writing her decision, which runs to 107 paragraphs. The Judge's decision is in many respects a strong example of a thoughtful and considered decision. It is one to which this Tribunal would usually give careful thought before intervening. Unfortunately, there are occasions where the pulling of a single stray strand of a decision results in it ultimately having to be set aside. It is unfortunate that this is one of those rare occasions.

17. The primary focus of the appellant's challenge is directed towards [63] - [65] of the Judge's decision:

'63. The appellant has provided what he describes as new evidence received from his village elders in Afghanistan which corroborates his claim as to what happened in the past and relates to ongoing risk on return. These documents are contained at pages 9 to 21 of [the appellant's bundle]. This documentation was not provided before and no cogent explanation has been provided as to why it is being produced now.

64. The appellant's explanation is that he asked his friend to do a favour for him because he visits Afghanistan regularly (almost yearly) and the appellant wanted to know if his uncle was living in Afghanistan. Mr. Hashmi claims that his cousin met with the elders of the appellant's village and that they state that the appellant's uncle was killed by the Taliban and left a letter for him which was a second warning letter. The report is provided by the elders in support of the appellant's claim that his life is at risk should he return to Afghanistan. Mr. Hashmi claims that he brought the letters from the elders back from Afghanistan for the appellant along with the two warning letters from the Taliban when he returned from Afghanistan in 2017.

65. There is however no evidence to support Mr. Hashemi's claim to have obtained a letter from the elders in his village and no communication from his cousin who are said to have obtained the documents and also no evidence to indicate where he obtained the warning letters from. One of the warning letters is dated 2011 and the other 2015. The appellant's uncle visited the village elders in 2013 and could have obtained some of the documentation earlier. No evidence has been provided to demonstrate how the letters were obtained and where they have been kept all this time until they were obtained in 2017. No

explanation is provided as to why a second warning letter was issued some six years later when the appellant had remained in Afghanistan for eight months after the alleged murder of his father without the adverse attention of the Taliban or otherwise coming to harm at their hands. I find that the same arguments can be levelled against the report provided from the village elders who claim that the appellant was issued with a serious notice on 20 October 2017. There is no evidence to support who has written the report and how they are known to the appellant, how they were made aware the appellant was alive and not in Afghanistan.'

18. I observe that though the Judge assessed the warning letters and the elders' report initially at [64]-[65] and then over subsequent paragraphs, she made initial observations at [46]:

'46. I note that additional correspondence and documents were provided to the Appellant by his uncle, Daoud, a resident of Pakistan, which were claimed to have been obtained on a journey by him to the Appellant's home village in Afghanistan. I am unclear as to why the Appellant found it necessary then to send his friend Mr Hashmi from the UK to Afghanistan to obtain further documentation for the present claim. This includes the so-called letters from the Taliban and from the village elders. It is not clear why some of this information was not provided before when there was an opportunity to do so via the Appellant's uncle. No clear explanation has been provided in relation to this. I note and accept the adverse findings of UTTJ Davey in relation to the documentation before her [sic] at paragraphs 23 - 26 of her decision.'

19. Before embarking upon detailed consideration of ground 1, I identified at the hearing that it was proper that consideration be given to the lawfulness of the approach adopted by the Judge at [46].

20. It is unfortunate that on the first occasion where she considers the warning letters from the Taliban, she describes them as 'so-called letters'. 'So-called' has clearly understood negative connotations, describing someone or something as not being suitable or correct. Whilst its use may be inadvertent, in this matter it is strongly - and unfortunately - suggestive as to an adverse conclusion reached upon the letters before detailed reasoning was provided.

21. The Judge then proceeds at [46] to observe that it is not clear why 'some' of this information was not provided before when there was an opportunity to do so. The use of the word 'some' is too general to adequately permit identification as to which correspondence and documents were the focus of the Judge's concerns.

22. It is then unfortunate that having made these two observations, the Judge proceeds to note the adverse findings made by Judge Davey as to the use of documentation in his decision of 2013 without attendant, and clear, confirmation that such findings are merely the starting point of her consideration and not determinative: *Devaseelan (Second Appeals - ECHR*

- *Extra-Territorial Effect) Sri Lanka** [2002] UKIAT 00702, [2003] Imm AR 1. The engagement with the warning letters, with attendant scepticism as to their not being genuine, at [46], prior to subsequent consideration from [63] onwards is the antithesis of the required holistic assessment: *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All E.R. 449.

23. Whilst on their own the considerations at [63] to [65] may well be sustainable, I conclude that they are tainted by the approach adopted at [46]. Despite the clear efforts of the Judge to address with care the issues arising in this appeal, the only conclusion that can be drawn from [46] is that an adverse conclusion was reached as to the genuineness of the warning letters, based in part upon the clear adoption of previous concerns raised by Judge Davey as to the provenance of documentation placed before him in 2013. The reaching of such conclusion was long before the substance of the warning letters was considered from [63] onwards. The approach adopted is clearly a material error of law and adversely taints subsequent assessment. In the circumstances the Judge's consideration of the asylum appeal, as well as the human rights (article 3) appeal, must properly be set aside.

Article 8

24. As to article 8, considerable time was spent at the hearing before me seeking to identify whether the approach by the Judge at [103] was lawful.

'103. In relation to Article 8 ECHR on the basis of private and family life I accept the findings of the Upper Tribunal. Articles 3 or 8 on medical grounds are not challenged on the evidence before me. Very significant obstacles to his integration to Afghanistan do not exist on the same factual basis as his asylum claim is refused and I refer to my above findings. He will have sufficient knowledge culturally and with the benefit of family and friendship links with Afghanistan to be enough of an insider to engage in life day-to-day.'

25. Reliance was placed by the appellant upon the finding that 'very significant obstacles to his integration to Afghanistan do not exist on the same factual basis as his asylum claim is refused and I refer to my above findings' as resulting from a failure to adequately consider the appellant's case.
26. Mr. Allison noted that the skeleton argument filed with the First-tier Tribunal and the oral submissions of counsel who attended the initial hearing, not Mr. Allison, were explicit as to the appellant relying upon paragraph 276ADE(1)(vi) of the Rules in respect of there being insurmountable obstacles to his return to Afghanistan because of (1) the length of his residence in the United Kingdom, (2) the absence of his family ties in Afghanistan and (3) the resulting difficulties of his re-integrating in Afghanistan for those factors, especially following the

Taliban's recent return to power. These issues were said to go beyond those raised in his international protection appeal.

27. I have considered this paragraph with care and reached the conclusion that the sentence relied upon by Mr. Allison cannot properly be read in the absence of the next sentence, 'he will have sufficient knowledge culturally and with the benefit of family and friendship links with Afghanistan to be enough of an insider to engage in day-to-day life.' In the circumstances, though brief the Judge's reasoning on its face is sufficient.
28. Can the decision on the article 8 appeal withstand the material error of law arising in the international protection appeal? I conclude that whilst the Judge took great care to consider the appellant's connection to Afghanistan and his ability to re-integrate, the fundamental problem is that the Judge failed to lawfully consider the warning letters and the elders' report, and such failure results in there having been inadequate assessment of the real risks the appellant may have at the hands of the Taliban-led government of Afghanistan. Without an adequate consideration of the international protection claim, there cannot in the circumstances of this case be an adequate consideration of the appellant's case under paragraph 276ADE(1)(vi) of the Rules.
29. I am mindful that an error of law arising at [46] has materially undermined what appeared upon initial inspection to be a carefully considered decision. However, the error is material, and its adverse impact has flowed through the decision. In those circumstances, the appellant's challenge to the human rights (article 8) decision is upheld.
30. The only proper course of action is for the decision of the First-tier Tribunal to be set aside with no findings of fact preserved.
31. I wish to observe my thanks to both Ms. Nolan and Mr. Allison for their erudite and very helpful submissions during a lengthy hearing.

Remaking

32. The representatives agreed that the most appropriate course would be for this matter to be remitted back to the First-tier Tribunal for the resumed hearing. Having regard to the overriding objective and being mindful of paragraph 7 of the Joint Practice Statement of the First-tier Tribunal and the Upper Tribunal, I am satisfied that 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 it can only properly be conducted by the First-tier Tribunal.

Decision

33. The decision of the First-tier Tribunal sent to the parties on 21 October 2021 is set aside for material error of law pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

34. No facts are preserved.
35. The remaking of the decision will be conducted by the First-tier Tribunal sitting at Hatton Cross; to be undertaken by any Judge other than Judge of the First-tier Tribunal Hosie.
36. The anonymity order is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 5 July 2022