



IN THE UPPER TRIBUNAL

Case No: UI-2022-006544

IMMIGRATION AND ASYLUM CHAMBER

FfT No: PA/52752/2020

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 20 November 2023**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

UK

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Representation:

For the appellant: Mr P Draycott, Counsel, instructed by Pristine Law Solicitors

For the respondent: Mr C Howells, Senior Presenting Officer

Heard remotely from Field House on 10 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Reid (“the judge”), promulgated on 17 March 2022 following a remote hearing on 7 March of that year. The judge dismissed the appellant’s appeal against the respondent’s refusals of his protection and human rights claims.
2. For the reasons set out later in this decision, I have concluded that the judge materially erred in law when dismissing the appellant’s appeal, that the judge’s decision must be set aside, and that the appellant’s appeal should be remitted to the First-tier Tribunal for a complete re-hearing with no preserved findings of fact.

Background

3. The appellant claims to be a national of Afghanistan, although this has been disputed by the respondent throughout. He arrived in the United Kingdom in October 2015 and it seems to be common ground that he was aged 18 at that time. He claimed asylum the day after his arrival, but, for reasons unknown, there was a significant delay in making a decision on that claim; the refusals of the protection and human rights claims not being issued until 26 November 2020.
4. The appellant’s protection claim can be summarised as follows. He asserted that he came from Laghman Province in Afghanistan and was un-educated. An uncle had worked as a local police commander and the appellant had become an informer on the Taliban for this uncle. The Taliban had discovered his activities, gone looking for the appellant, and had killed the uncle. Threats had been made against the appellant himself. Arrangements were put in place for the appellant to leave Afghanistan. His journey to the United Kingdom was overland. He had encountered the authorities in Hungary, but had not claimed asylum there.
5. The respondent disputed the appellant’s claimed nationality, relying on a lack of knowledge about geography and other matters, the use of an Urdu word at interview, and inconsistencies between his own evidence and the country evidence. The underlying protection claim also suffered from evidential problems. The appellant’s credibility was damaged by his failure to have claimed asylum in a safe country on route to the United Kingdom.
6. The respondent did accept, however, that if the appellant was indeed a national of Afghanistan and was at risk from the Taliban, there would be no state protection or any internal relocation option.

The judge’s decision

7. As I will be dealing with relevant aspects of the judge's decision when stating my reasons for the error of law conclusion, it is unnecessary to set out her findings in detail here. The parties are obviously well-aware of these. I intend no disrespect in adopting this approach: her decision is clearly a conscientious piece of work and I have read it carefully before reaching my overall conclusion.
8. In brief summary, the judge addressed the issue of the appellant's nationality in conjunction with the account of past events: these two aspects of the appeal were "inextricably linked": [32]. Whilst the judge found that certain matters held against the appellant by the respondent were not damaging to credibility ([33]-[36]), other matters clearly were. The judge was not satisfied as to the appellant's lack of knowledge on certain matters, such as his date of birth in the Afghan calendar, or the cost of his journey to the United Kingdom: [37]-[38]. The appellant had not been frank about his family circumstances and contact: [42]-[44]. Other matters known by the appellant type of Taliban income tax and the provider of mobile telephone services in Afghanistan pointed towards the appellant being more educated than he had claimed: [40], [46]. The judge accepted that the appellant suffered from PTSD, but not that this had been caused by claimed past events in Afghanistan: [50]. The appellant's credibility was damaged by his failure to have claimed asylum in Hungary: [52]. There was a problem with the appellant's evidence as to what he had told a GP about his personal circumstances: [53].
9. Ultimately, the judge concluded that the appellant was not a national of Afghanistan and it was "more plausible" that he was from another unspecified country. Therefore, the appellant would not be at risk from the Taliban because he would not be returned to Afghanistan: [54].
10. As to Article 8, the judge weighed up a number of factors for and against the appellant and concluded that removal would not be disproportionate, seemingly on the basis that the appellant was not an Afghan national and therefore would not be returned to that country: [56]-[60].

The grounds of appeal and grant of permission

11. Five grounds of appeal were put forward. In summary, they asserted that the judge had erred in the following ways:
 - (1) Applying the wrong standard of proof (although the ground in question is headed "burden of proof", this is clearly wrong, although nothing arises from the infelicitous use of terminology);
 - (2) Inadequate assessment of the appellant's nationality: *firstly*, combining the assessment of nationality with the evidence relating to claimed past events;

secondly, failing to take into account findings made which in fact supported the appellant's claimed nationality; *thirdly*, failing to appreciate that the burden of proving nationality had shifted in this case to the respondent; *fourthly*, the judge purported to make a finding as to an alternative nationality; *fifthly*, the judge failed to go on and make a finding on risk, notwithstanding the conclusions on nationality;

- (3) Erroneously holding the appellant's failure to have claimed asylum in Hungary against his credibility;
- (4) Only assessing the relevance of the expert medical evidence after having made adverse credibility findings against the appellant, contrary to the principles set out in Mibanga [2005] INLR 377;
- (5) Failing to take proper account of the significant delay by the respondent in deciding the appellant's asylum claim.

12. Permission was granted by the First-tier Tribunal on all grounds.

Rule 24

13. The respondent did not provide a rule 24 response in this case. That failure did not preclude the fair determination of the error of law issue.

The hearing

14. Mr Draycott and Mr Howells assisted me with clear and concise submissions at the hearing, for which I am very grateful. These are of course a matter of record and I do not propose to set them out here. I will address relevant aspects when setting out my conclusions, below.

15. Both representatives were agreed that if I concluded that the judge had erred in law, the appropriate course of action would be to remit the case to the First-tier Tribunal for a complete re-hearing.

Conclusions

16. I have already referred to the judge's decision as being a conscientious piece of work. I have exercised appropriate restraint before interfering with it. The judge considered a range of evidential sources including oral evidence from the appellant. It is not for me simply to substitute my own view of the evidence with that of the judge.

17. I have stated my conclusion on error of law at the outset of my decision. I now set out my reasons for that conclusion. In so doing I will take the appellant's grounds of appeal

out of order, dealing first with those which do not demonstrate errors of law and ending with the aspects of his challenge which do.

Ground (1): standard of proof

18. The appellant takes issue with the terminology used by the judge at [14] of her decision, where she directed herself as follows: “In essence, an appellant will have to show that there are substantial grounds for believing that the appellant is outside his or her country of nationality, or if applicable, his or her country of former habitual residence, by reason of a well-founded fear of persecution for a Refugee Convention reason...” It is said that the phrase “substantial grounds for believing” is inconsistent with the correct standard of proof, namely whether there is a “reasonable likelihood” or “real risk” of claimed persecution occurring on return.
19. I reject this ground of challenge. It might have been preferable if the judge had indeed used the well-known “reasonable likelihood” or “real risk” terminology. The latter is the formula settled on by the Court of Appeal in PS (Sri Lanka) [2008] EWCA Civ 1213, at [11], approving a passage in MacDonald’s *Immigration Law and Practice*. However, there is in substance nothing objectionable or legally impermissible in the judge adopting the terminology she did at [14]. It is important to note that Lord Keith of Kinkel’s Opinion in ex parte Sivakumaran [1988] AC 958, at 994 (being the domestic foundation of the lower standard of proof in asylum claims) regarded a number of different phrases as appropriately expressing the applicable standard. Amongst these was “substantial grounds for thinking”, used by Lord Diplock in ex parte Fernandez [1971] 1 WLR 987, at 994. In short, I see no difference in substance between “substantial grounds for thinking”, “reasonable likelihood”, and the judge’s phrase of “substantial grounds for believing”. Her use of the phrase “lower standard of proof” at [54] when stating her overall conclusion on the issue of nationality goes to support my view that the appropriate standard was indeed applied throughout her decision when addressing the protection claim. There is no error of law here.

Ground (4): the medical evidence

20. I acknowledge that what the judge said at [50] might, at least at first glance, indicate that she had left her consideration of Professor Cox’s report until after the adverse findings on credibility had already been made. Yet, on a fair and holistic reading of the judge’s decision, I conclude that her approach is sustainable. *Firstly*, as a matter of structure, a judge needs to address various elements of the evidence in some order. It might in some circumstances be preferable for consideration of medical evidence to appear earlier in the relevant section, but that is not obligatory. *Secondly*, [2] and [31] indicate that the judge took Professor Cox’s evidence into account when assessing the

evidence. Those statements came before the judge's findings on credibility. *Thirdly*, the judge in fact considered the medical evidence before going on to make certain other findings in addition to those already stated. *Fourthly*, the judge was entitled to note that the medical report did not identify any particular memory problems on the appellant's part. That is relevant because number of the a number of the adverse credibility points were predicated on a claim inability to recall information about Afghanistan and/all past events. There is no error of law here either.

Ground (5): Article 8 and delay

21. There clearly was a significant delay in deciding the appellant's asylum claim, for which no explanation has been provided by the respondent. However, it is sufficiently clear to me that the judge took this particular consideration into account when conducting the proportionality exercise, as demonstrated at [59]. In addition, there is merit in Mr Howells' accurate observation that nothing of substance was said about delay when the appellant was putting forward his case to the judge.

Ground (2): nationality

22. This ground of appeal has been sub-divided into a number of points, as set out earlier in my decision. Not all of these points disclose errors of law.

23. Applying what was said at [27] of Agartha Smith 00TH02130, the judge was in principle entitled to consider the issue of nationality in light of the evidence as a whole, including that relating to claimed past events in Afghanistan, rather than treating it as a discrete preliminary matter.

24. The judge did not err by failing to conclude that an evidential burden had shifted from the appellant to the respondent: a fair reading of [14] of Agartha Smith indicates that such an approach is only likely to arise (if it does at all) where an individual has produced a "potentially decisive item of evidence as to nationality". In the present case, the appellant had produced no such evidence (for example, a Taskera or birth certificate).

25. The judge did not err by stating at [54] that, "it is more plausible that he is from another country..." That statement followed after the clear finding in the previous sentence that the appellant was not a national of Afghanistan. Whilst it might have been better if the judge had not gone on to make the statement in question, it does not disclose an error of approach because the core issue relating to the nationality claimed by the appellant had already been determined.

26. The judge did not, on the facts of this case, err by failing to go on and reach a conclusion on the claimed risk in Afghanistan notwithstanding the adverse conclusion on

nationality. On a “belt and braces” approach, such a conclusion might have been made, but was not and it was not incumbent on the judge to do so.

27. I turn to the matter in respect of which the judge did materially err in law. Once she had decided to consider the issue of nationality as part of the overall assessment of the evidence as a whole, it was incumbent on her to pay particular attention to the question of whether the appellant might be a national of Afghanistan notwithstanding certain adverse credibility findings. I appreciate that such findings could relate not only to the knowledge of the country of claimed nationality, but also other more general matters claimed past events. What will often be a difficult task must, however, be addressed with sufficient care in order to ensure consistency of reasoning and the consideration of all relevant matters, both for and against the individual. In saying this, I bear in mind the observations stated at [54] of Agartha Smith to the effect that even “meagre” evidence of nationality may be sufficient in asylum claims.
28. Whilst I have a degree of sympathy with the judge - being faced with a difficult task - I agree with Mr Draycott’s submission that she failed to step back, as it were, and consider relevant findings which supported the appellant’s claim nationality. Mr Draycott was entitled to emphasise the significance of the judge’s findings at [33], [35] and [36]. A number of matters regarded by the respondent as adverse were found not to be so. The judge concluded that the appellant’s ability to speak Pashtu was “an important factor as plausibly tending to show he is from Afghanistan”: [33]. The respondent had not undertaken any language analysis: [33]. The inability to state the date of Independence Day was not significant: [35]. The appellant’s claim to have had a paper Tazkera issued for him by his uncle was not implausible because such documents were still being produced in Afghanistan in 2015: [36].
29. Mr Howells submitted that some or all of these findings were of “neutral” value only. In part, I disagree. The judge’s finding on language was, on a sensible reading, favourable to the appellant; it was described as an “important factor” pointing towards the claimed Afghan nationality. Perhaps of greater significance was the finding on the Tazkera. In effect, the judge at least appeared to accept that the document had been issued. This was based on her assessment of the appellant’s evidence judged against the country information. It related to a specific form of identification documentation issued in Afghanistan and not any other country.
30. Later on in her decision, the judge made two adverse findings which were in my judgment clearly relevant to the issue of nationality. This is so despite the somewhat unattractive proposition that adverse findings can be supportive of an individual’s claim in certain circumstances. *Firstly*, at [40] the judge accepted that the appellant had knowledge of what was described as the “Taliban Oshar tax” (what appears to be a form of income tax on agricultural produce). The judge found that this specific knowledge pointed away from the appellant’s claim to be uneducated. She was entitled to do so.

On the other hand, knowledge of what was clearly a country-specific matter (a tax imposed by the Taliban) was potentially relevant to the claimed Afghan nationality. *Secondly*, at [46] the judge appeared to accept the appellant's evidence on the name of an Afghan mobile telephone service provider. Again, this was country-specific and capable of supporting the claimed Afghan nationality.

31. Mr Howells suggested that the appellant's knowledge could have been learnt from other sources and the judge had previously suggested that some knowledge on other matters might have been obtained in this way ([35]). The judge might have been entitled to make such a finding, but she did not do so. Mr Howells also noted the absence of a challenge to the judge's finding that the appellant was not uneducated, as claimed. That is correct, but it does not of itself negate the relevance of the findings at [40] and [46] to the question of nationality.
32. Bringing the above together, I am satisfied that the judge failed to take proper account of all of her findings relevant to the nationality issue when reaching her overall conclusion, with particular reference to those at [33], [35], [40], and [46]. The judge may well have been entitled to reject the underlying substance of the appellant's claim in respect of past events, but the approach of considering all of the evidence before reaching a conclusion on nationality has, in this particular case, led to error.
33. I conclude that the error must be material to the entirety of the appellant's protection and human rights claims, both in respect of nationality and the underlying substance. The judge did not reach reasoned conclusions on the protection claim because of her conclusion on nationality. In addition, whilst a number of relevant factors were considered under Article 8, the relevance of the PTSD diagnosis was addressed on the premise that the appellant would not be returned to Afghanistan. If that premise is erroneous, so too would be the consideration of relevant evidence.
34. The judge's error on ground (2) is sufficient for her decision to be set aside in its entirety.

Ground (3): failure to claim asylum on route

35. At the hearing, Mr Howells accepted that the judge had erred in concluding that the appellant's failure to have claimed asylum whilst in Hungary damaged his credibility. It was submitted, however, that this was immaterial. I disagree. Whilst it is clear enough that this consideration was not of the greatest significance, it nonetheless undermined the appellant's credibility. It was that credibility which went to the heart of the appeal before the judge.

36. I am satisfied that the judge did err and that the error was material to the overall assessment of credibility, which included the issue of nationality.

Disposal

37. The judge's decision is set aside. It would be artificial to preserve any findings of fact and I do not do so. The representatives are (sensibly) agreed that remittal is appropriate.

38. I observe that the appellant has now obtained further evidence in respect of his claimed nationality. I have not of course considered this evidence, but it is likely that the First-tier Tribunal will need to do so in due course. In light of this, and all the other circumstances, it may be sensible for there to be a remote case management hearing in the First-tier Tribunal before the substantive hearing takes place.

39. There was a discussion as to which First-tier Tribunal hearing centre would be the most appropriate at which the remitted hearing should take place. It will be for the appellant's representatives to correspond with the First-tier Tribunal to establish that.

Anonymity

40. to maintain the anonymity direction previously made because this case concerns protection issues. As matters stand, this consideration outweighs the important principle of open justice.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

- (1) This appeal is remitted to the First-tier Tribunal;
- (2) There shall be no preserved findings of fact;
- (3) The remitted hearing shall be conducted by a First-tier Tribunal Judge other than Judge Reid.

Appeal Number: UI-2022-006544

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 13 November 2023