



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005063

First-tier Tribunal No: PA/04760/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

3rd January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

G.S
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms L. Appiah Counsel, Vine Court Chambers – Direct Access

For the Respondent: Ms S. McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 21 September 2023

Order Regarding Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted by the First-tier Tribunal. I have not been asked to rescind that order. I have considered the principles of open justice. I am of the view that it is in the interests of justice that order continues. Unless and until a tribunal or court directs otherwise, the appellant 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.

DECISION AND REASONS

Introduction

1. The appellant was granted permission to appeal against the decision of Judge of the First-tier Tribunal H Graves (“the judge”) promulgated on 2 September 2022 dismissing his appeal against the decision of the respondent on 11 November 2020 to refuse his claim on protection and human rights grounds. Permission was granted by First-tier Tribunal Judge Hatton on 24 October 2022. Thus, the matter comes before me to determine whether the judge made an error of law.

Decision of the First-tier Tribunal

2. The appellant entered the United Kingdom on 18 July 2019, clandestinely, and claimed asylum. He says he is J.S [anonymised] born in 1988, a national of Afghanistan of the Sikh faith, from Jalalabad, Nangarhar. He claimed that he lived in a room in a Gurdwara with his parents. His father was killed in 2008 and his mother in 2018. His sister is married and her whereabouts are unknown. The appellant claimed that his life is at risk in Afghanistan due to his religion. In support of his claim, he provided to the respondent a copy of his Taskera, a Gurdwara ID card, a medical document from Afghanistan and a letter from the Gurdwara. The appellant also claimed that since his arrival, his family in the United Kingdom arranged a marriage between him and a British citizen - a religious marriage took place on 29 October 2020 - and they have since lived together.
3. The respondent refused the protection claim because she did not accept the appellant’s identity and nationality, and, concluded that he is in fact an Indian national. She relied on the appellant’s biometrics, including fingerprints, matching visa applications made to the United Kingdom in the name of G.S [anonymised], an Indian national born in 1982. She refused the appellant’s human rights claim on the basis that his partner was not a qualifying partner under Appendix FM, and there was no evidence of exceptional circumstances to warrant a grant of leave outside of the Immigration Rules.
4. Before the judge, the parties agreed the protection appeal turned on whether the appellant is an Afghan national, and this was the primary focus of the evidence. The judge heard evidence from the appellant through the assistance of a Punjabi interpreter, and from the appellant’s partner, her cousin and the appellant’s family friend. The judge also had before her documentary evidence and a linguistic report relied upon by the appellant.
5. A summary of the judge’s salient findings are as follows. The judge did not accept the appellant is an Afghan national. She concluded the linguist’s report “([did] not attract any significant weight”) for the reasons she gave at [78]-[106]. The judge characterised the appellant’s evidence as “consistently vague and inconsistent” and found that he was a “wholly unreliable” witness - noting various discrepancies in his evidence, his blatant attempt to distance himself from his immigration history, and the fact that his biometrics had been linked to visa applications made in India in 2006, 2008, 2010, 2015, 2018 and 2019, which was inconsistent with his evidence that he spent a majority of his time in Jalalabad (at [107]-[125]). The judge noted the difficulties the appellant had in providing basic information about his life in Afghanistan; observed that he only speaks Punjabi, and further noted inconsistencies in his evidence relating to the provenance of an Afghan passport and two Indian passports (at [111]-124]) and two Taskeras (at [126]-[138]). Further still, the judge identified deficiencies in the supporting evidence attesting to the appellant’s Afghan nationality and found the evidence

of the witnesses was insufficient to outweigh the concerns regarding the evidence overall and, moreover, noted that family members who could attest to the appellant's nationality had not given evidence (at [139]-[146]).

6. The judge then considered the appeal under Article 8 both within and outside of the Immigration Rules and gave this short shrift in view of her adverse findings [(at (153)-(156)].

The Grounds of Appeal

7. The grounds of appeal seek to challenge the judge's finding that there was insufficient reliable evidence that the appellant is an Afghan national. There are eleven grounds. They are not demarcated into separate sub-headings identifying the alleged error. They are nonetheless concise; some share a common theme and can be summarised as follows. Ground 1 asserts the judge's consideration of the linguist's report was inadequate. Ground 2 asserts the judge's finding that the appellant's evidence was vague in relation to the whereabouts of his Afghan passport is inadequately reasoned. Ground 3 avers the judge failed to adequately consider the evidence pertaining to two Indian passports, which according to the appellant were not genuine and made findings not in accordance with the evidence. Ground 4 asserts that the appellant was disadvantaged by a remote hearing, and thus the judge erred in "[finding] that she had not seen the original of the Taskera of Khatar Singh". Ground 5 argues the judge applied a higher standard of proof to that applicable in protection claims. Ground 6 and 7 (and Ground 11) raise issues in relation to procedural fairness. Ground 8 asserts the judge failed to consider background evidence that supported the appellant's case that his Indian passports are false. Ground 9 asserts the judge's finding the appellant is an Indian national who had travelled on three visas was not consistent with her finding that the appellant is an economic migrant. Ground 10 argues the judge failed to consider material evidence regarding the authenticity of the Indian passports.
8. Whilst the appellant was granted permission to appeal on all grounds, it was grounds 1, 3 and 10 that was the subject of comment in the grant of permission.
9. The respondent did not file a rule 24 response.

Discussion

10. Both representatives made submissions. Ms Appiah relied on the grounds but was content to deal with the grounds expressly referred to in the grant of permission, and Ms McKenzie confined her submissions to those specific grounds and submitted the remaining grounds were a mere disagreement with the judge's findings. I do not recite all the submissions in detail except to explain why I have reached my decision which I now do. Regrettably, I have had to rewrite this decision as the original file was lost.
11. This is a finely balanced appeal. On the one hand, the judge's decision is careful and detailed, yet on the other, Ms Appiah has been able to identify difficulties with the judge's evaluation of the evidence that cannot in my view, as Ms McKenzie sought to suggest, be characterised as mere disagreements with the judge's findings. Whilst there is no merit in many of the grounds, I am persuaded, just, by Ms Appiah that the judge materially erred in law and that her decision cannot be allowed to stand. I shall take the grounds in turn, save for the grounds that share a common theme, which I consider compositely.

12. Ground one takes issue with the judge's consideration of the linguist's report, contending that she failed to properly consider it. The grounds refer to section 7.2 to 7.5 of the report dated 15 December 2021, and the expert's statement of 26 April 2022, and assert that the expert did not "[fall] into the shoes of the Tribunal", and that her conclusion the appellant was born in Afghanistan "was comprehensive".
13. I agree with Ms McKenzie that this ground is no more than a disagreement with the judge's findings and attempts to re-argue the appellant's case. The judge aired that she had some concerns about the expert evidence at the hearing, but nonetheless was mindful in her approach and considered the appellant's claim within the context of that evidence. It is appreciably clear that in her deliberations the judge considered the expert evidence in detail at [78] to [106], and commented upon the various deficiencies with that evidence, including the expert's expertise as a linguist, and the expert's interview with the appellant upon which the report is based. The expert describes herself as a "Chartered Linguist - Interpreter and Translator". Whilst the judge accepted the expert was an experienced interpreter, she noted *inter alia* the expert's CV did not set out any qualifications, experience or expertise in the assessment of nationality through linguistics and noted the report did not comply with the Tribunal's Practice Direction (at [79-81]). The judge then gave several examples of the appellant's "evasive and vague answers" during the interview with the expert that went unnoticed and were elicited to some extent through the expert's leading questions (at [82]-[95]).
14. The judge then turned to consider the expert's statement of 26 April 2022, prepared "presumably in response to the respondent's concerns about the absence of any process of assessment in the original report, that it is the appellant's accent that sets him apart as an Afghan Sikh" (at [96]). Whilst the judge noted this was not stated in the original report, she considered the expert's statement and her report within the context of the wider evidence and attached "little to no weight to the conclusions" for the reasons she gave (at [97]-[105]).
15. The grounds complain the judge did not adequately consider the expert's view at section 7. In this section the expert sets out her conclusions. They are brief. In summary, she opines from the appellant's tone, accent, and his "mannerism in the structure and expression of the language" was typical of Afghani Sikhs. For that reason, she concludes the appellant "was born in Afghanistan". The expert went on to assert *inter alia* that there "was nothing in the accent / tone/ inflections /..." that made her doubt Afghan Punjabi was the appellant's "mother tongues" [sic]. The judge was plainly not impressed by these conclusions and the foundations upon which they were based, and gave reasons based on methodology, the absence of any sources or references in the report, and gave many examples of "bias, or inference drawn beyond the expertise of [a] linguist" (at [100]-[105]), to support her findings.
16. The grounds do not properly, or at all, engage with the judge's detailed reasons for attaching "little to no weight" to the expert evidence. I do not agree with the observation made in the grant of permission that there was a "scant" attempt by the judge to engage with the expert's overriding conclusion. On the contrary, I am satisfied the judge's analysis was detailed and she gave cogent and adequate reasons for her conclusions. Those reasons explain fully why she was not prepared to attach much weight to the expert's conclusions. There is no

discernible error in her approach or consideration of the expert evidence. Ground 1 is not made out.

17. Ground 2 is essentially a reasons challenge. It is stated at [121] the judge did not provide reasons for her conclusion that the appellant was vague about the whereabouts of his Afghan passport and, assert that it is not clear how he could have contacted the Afghan Embassy in the UK to confirm the existence of that passport, when there was no evidence that he had any knowledge of the details relating to it. I agree with Ms McKenzie that this ground is a disagreement with the judge's findings. It is plain from the last sentence at [121] and, indeed, the preceding paragraphs at [107]-[120], and what followed at [122]-[125], why the judge found the appellant's evidence was in general vague and inconsistent and she specifically addressed the Afghan passport at [120]. These findings were based on the evidence and were on any reasonable view open to her. Ground 2 is not made out.
18. Ground 3 asserts the judge erred in failing to adequately consider the evidence pertaining to two Indian passports, which the appellant asserted were not genuine. Specifically, it is asserted the judge failed to consider the appellant had two passports, in two different names, with two different dates of birth and locations of birth. The judge was clearly aware that the appellant had two passports in two different identities and addressed this at [148]. Nonetheless, there does appear to be some tension between the finding therein that the appellant "travelled widely, using those passports", in consequence of his biometrics being matched to visa applications made in India in 2006, 2008, 2010, 2015, 2018 and 2019, and what the judge records at [7]-[9], that she had not been provided with any evidence that said visas issued in 2006 and 2010 were ever used. It is thus not clear what evidential basis the judge had for concluding that the appellant travelled on those visas. Ms McKenzie referred me to the judge's discussion of the appellant's evidence at [34],[36] and [50]-[52], but this evidence does not relate to visas issued in 2006 and 2010. In consequence I see some force in Ms Appiah's submission that the judge was mistaken in her view of the facts and reached a conclusion unsupported by the evidence. Had this been a stand-alone error, I would question its materiality, but in view of my conclusions in respect of other grounds, I am persuaded that it is. Ground 3 is made out.
19. Ground 4 criticises the judge's consideration of a Taskera in the name of Khatar Singh (the appellant's claimed father) at [136]. The grounds argue the judge made adverse findings on the basis that she had not seen the original Taskera. This it is argued *inter alia* caused unfairness as the hearing took place by remote means notwithstanding the appellant's request for a face-to-face hearing where the original of this and other documents could have been examined. The grounds further allude to an email sent to the respondent inviting him to examine the original Taskera, to which it is said there was no response. The difficulty with this ground is that at [136], the judge merely observed that she had not seen the original Taskera or indeed any other document. On any reading of that paragraph the judge does not state that she takes an adverse view on the basis that the original Taskera was not before her. If the judge had said so, Ms Appiah may well have a point, but the judge did not go that far. What in fact the judge proceeded to do was to examine the information contained in a copy of that document and comment upon its contents. That was an entirely legitimate approach. Further, it is notable the grounds do not suggest that the judge's commentary was inaccurate. I am satisfied the judge made findings on the available evidence and there was no procedural unfairness. This ground is not made out.

20. Ground 5 takes issue with the judge's application of the standard of proof, it being asserted that she applied an elevated threshold. The judge's self-direction on the burden and standard of proof at [74]-[75] is sound in law. She correctly identified the standard of proof "is to the lower standard, being "a reasonable degree of likelihood"...". It is clear the judge applied that standard of proof throughout. The grounds of appeal, save for a reference to [138] of the judge's decision, do not particularise with sufficient clarity where in the decision the judge applied an elevated threshold. At [138] the judge concludes her assessment of the documentary evidence and finds that "[h]ad his evidence been clear, consistent and credible, I might have considered whether there were explanations for the discrepancies and concerns about the documents." That is very far from demonstrating the judge applied a higher standard of proof. This ground is without merit.
21. I shall deal with Ground 6, 7 (and 11) compositely as they share a common theme and relate to similar evidence. It is not necessary to deal with each discrete issue raised within each of the grounds, but the following is material. At [141]-[142] and [145] the judge in considering the evidence of the witnesses and the supporting letters from various individuals attesting to the appellant's Afghan nationality said *inter alia* this:
- "141. Of the appellant's relatives listed by the Gurdwara, as being able to establish his identity, only one, [...], attended the hearing before me. I therefore did not have the benefit of hearing evidence from any of the appellant's family, who he says can establish his identity..."
142. The other family members, [...], are mentioned in the Gurdwara letter, and all say in their statements that they are the appellant's cousins who are themselves Afghan Sikhs from Jalalabad, who knew the appellant there. Yet none of those relatives, who could give direct evidence as to the appellant's family history, his personal circumstances and residence in Afghanistan, attended the hearing..... Little weight can be placed on witness statements of people who do not attend court to allow their evidence to be tested, and I find it concerning that I have not heard from any of the people the appellant says can give direct evidence of his nationality. I also note he made no mention of most of them, when he was asked by the respondent about relatives in this country. I find the DNA evidence does not establish the appellant's nationality. Any number of people have relatives of a certain nationality who are not themselves of that nationality.
- ...
145. The appellant also told the respondent that all of his childhood friends from the Gurdwara were 'here' in the UK (AIR104), but I have not heard evidence from these friends, if they are indeed in the UK".
22. It is apparent from the above that the judge factored into her assessment a failure by the appellant to call oral evidence from family members and friends who could attest to his Afghan nationality. Ms Appiah submits that this was procedurally unfair as the witnesses had attended the hearing on two previous occasions and it was as a consequence of the judge's direction "that there were too many witnesses attending and there should be consideration as to who should be called", and, the respondent's indication in consequence that she sought to only cross-examine the appellant, his partner, and two additional witnesses (not the appellant's cousins), that the remaining witnesses were not called to give evidence.

23. The respondent does not dispute the procedural history outlined by Ms Appiah who provided to the Tribunal a correspondence bundle that establishes her intention from the outset to call nine witnesses, including the appellant's cousins the judge referred to at [142]. The appeal first came before the judge on 2 March 2022. At that hearing, and during the appellant's evidence, various issues arose relating to the Taskeras and the hearing was adjourned to allow Ms Appiah to obtain evidence to deal with those matters. There is no dispute by the respondent that the nine witnesses attended on that day. There were clearly some logistical difficulties in co-ordinating diaries thereafter and a resumed hearing on 4 May 2022 was adjourned due to representative and or witness availability. In her letter of 6 May 2022 to the Tribunal, Ms Appiah referred again to her intention to call nine witnesses and provided dates to avoid. On 11 May 2022 the judge issued directions to the parties, directing the appellant to "consider very carefully what exactly any oral testimony from each of the proposed witnesses will add", and to the respondent, "...to agree whether any particular witness needs to be called to give oral testimony". On the same day, Ms Appiah wrote to the Presenting Officers Unit stating amongst other things her intention to call all the witnesses unless in response to the judge's directions any of the witness evidence could be agreed. On 16 June 2022, Ms Appiah notified the Tribunal in writing that the respondent had indicated he wished to cross-examine the appellant, his partner, and the two witnesses that gave evidence before the judge. The hearing then resumed on 23 June 2022.
24. I have troubled by this procedural history, in a case where the appellant's nationality was fundamental to the outcome of this appeal. There was nothing procedurally wrong in the judge exercising her case management powers in the manner that she did in view of the number of witnesses the appellant proposed to call. That, in view of the overriding objective, is a course that is to be encouraged. However, it does appear that material witnesses were not called in consequence of the judge's direction and the events that followed. Whilst ultimately, it was a matter for Ms Appiah to tender any witness she considered relevant to the issues notwithstanding the respondent's position - I have not seen any evidence that the respondent agreed the evidence of the appellant's cousins' - at the very least, the judge should have factored the procedural history into her assessment in determining the weight to be attributed to the written testimony of the witnesses not called to give evidence. The judge was plainly concerned about the lack of material witness evidence and the procedural history was relevant to, and may well have, addressed some of those concerns. Whilst I do not accept there was procedural unfairness, I am satisfied the appellant has established the judge failed to consider material matters that potentially gave rise to unfairness. Ground 6 is made out. Ground 7 and 11 add nothing material to this.
25. Ground 8 states the judge failed to consider background evidence which established fraudulent documents such as passports are readily obtainable in India. Whilst I acknowledge the judge did not expressly refer to the background evidence Ms Appiah states the judge failed to consider, the judge was not required to do so, and it is clear at [148] that the judge considered the "information" relied upon by Ms Appiah that "Afghans can and do obtain false documentation as Indian nationals". Ground 8 is a mere disagreement with the judge's findings at [148] and is not made out.
26. Ground 9 essentially asserts the judge's finding that the appellant is an Indian national who "travelled widely" using two Indian passports endorsed with three visas is incompatible with a finding that he is an economic migrant. The

suggestion is that the former required the appellant to have demonstrated to the authorities that he had a “reasonable standard of living in India”, whereas an economic migrant would seek to leave in order “to improve his financial circumstances”. The grounds point to [148] of the judge’s decision. Here the judge was dealing with the appellant’s Indian passport in the name of J.S (his claimed true identity) and was considering the possibility of whether this passport was a copy of a real passport the appellant had simply used to his advantage. The judge concluded *inter alia* that the evidence “...could just as well indicate that he is Indian, and an economic migrant seeking to enter a third country by any means, as that he is not Indian”. Contrary to what is stated in the grounds, the judge did not find the appellant is an economic migrant at [148]. It seems plain to me that the judge here was examining the hypothesis being put to her by Ms Appiah within the realms of the evidence. That was an entirely legitimate approach and I discern no error in the judge’s consideration of the evidence and submissions. Ground 9 is not made out.

27. Ground 10 asserts the judge made findings that were not in accordance with the evidence. At [149] the judge said this:

“I have not considered the lack of evidence to be a matter that attracts any weight or inference, as a lack of evidence is not evidence itself. The appellant has explained why he could not get documentation from the Afghan embassy, and whilst it would have been open to him to contact the Indian embassy, the lack of such evidence is not a matter that I can consider”.

28. Shortly stated, the judge here was giving deference to the phrase “the absence of evidence is not evidence of absence”. Whilst that is sound in principle, I agree with Ms Appiah, first, that paragraph [149] does not accurately reflect the evidence that was before the judge, and second, that the judge failed to take material evidence into account. Contrary to what the judge stated, there was evidence before her first, from the appellant in his witness statement dated 26 April 2022, that he had through his representative [Ms Appiah] contacted the Indian Embassy for the purposes of authenticating his Indian passport, and second, this was supported by an email from Ms Appiah on 29 November 2021 to the Indian Embassy requesting them to confirm whether they could verify the appellant’s Indian passport. Whilst the judge stated at [126] that she had considered all the documents, there is no reference to this evidence. It does appear therefore that the judge overlooked evidence that supported the appellant’s claim, on the mistaken view that there was no such evidence. Whilst I take Ms McKenzie’s point that the judge gave a plethora of reasons for rejecting the appellant’s credibility, the judge’s mistaken view is embedded within those findings, and I cannot exclude the possibility that this along with the other grounds I accept are made out, influenced or had a bearing upon the judge’s adverse view of the appellant and her finding that he is not an Afghan national. This ground is made out.
29. In summary, I recognise the judge made a conscientious effort to deal with the appellant’s complex immigration history and it may well be that she reached the right conclusion, but it is the manner and route by which that conclusion was reached that is flawed, and I cannot rule out the possibility that she was not influenced by the errors in her assessment of the appellant’s credibility for the reasons identified in ground 3 , 6 and 10.
30. For these reasons, I find the judge materially erred in law and her decision is set aside with no preserved findings.

31. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have considered the case of AEB [2022] EWCA Civ 1512 and Begum [2023] UKUT 46 (IAC). I consider given the extent of the fact-finding necessary in this case that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal on all issues.

Notice of Decision

The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of errors of law and is set aside. The appeal is to be reheard afresh on all issues by a judge other than Judge Graves.

R.Bagral
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 December 2023