



**IN THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM  
CHAMBER**

Case No: UI-2024-001513

(First-tier Tribunal No:  
PA/52414/2023)

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 7<sup>th</sup> of June 2024

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR  
DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**AK  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr Saleem, Solicitor, instructed by Malik & Malik, Solicitors  
For the Respondent: Ms Nwachuku, Senior Home Office Presenting Officer

**Heard at Field House on 23 May 2024**

**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 him. Failure to comply with this order could amount to a contempt of court.**

## **DECISION AND REASONS**

1. The appellant appeals with the permission of the First-tier Tribunal against a decision, dated 22 March 2024, of Judge of the First-tier Tribunal Chinweze (“the judge”) dismissing the appeal brought by the appellant on the grounds that removing him to Afghanistan would breach the United Kingdom’s obligations under the Refugee Convention and the Human Rights Convention.
2. The First-tier Tribunal made an anonymity order because the appeal involves protection issues. No submissions were made to us to lift the order, which is maintained.

### **The factual background**

3. The appellant’s immigration history is as follows. He left Afghanistan in 2011 and, after travelling through Iran, Turkey and Greece, arrived in Italy where he was granted asylum in March 2012. He left Italy and travelled to France from where he made various attempts to enter the United Kingdom before successfully doing so, clandestinely, on 24 August 2015. He claimed asylum but, before his claim was decided, he obtained an Afghan passport and flew back to Afghanistan on 1 June 2018. He left Afghanistan a second time a year later and travelled back to Italy, where he was told his status there had expired. He travelled through the Netherlands and Sweden before flying to the United Kingdom on 2 July 2019. He claimed asylum on arrival and his claim was eventually refused on 3 April 2023.
4. The appellant stated that he feared both the government of Afghanistan and the Taliban, although by the date of decision the Taliban had regained control of most of the country. The core of the appellant’s account was that the appellant’s father, a farmer, had a disagreement with a customer, called Hafeez, which escalated into a fight. It turned out that Hafeez was a member of the Taliban and he returned to the appellant’s father’s house the same evening with a group of armed men in order to discuss the situation. The appellant was sent out to get refreshments and, as he was returning, the Afghan National Army surrounded the house. A gunfight ensued. The Taliban accused the appellant and his father of informing the authorities of their presence and assaulted them. The appellant managed to escape. The appellant’s father was accused of assisting the Taliban and was subsequently sentenced to 12 years’ imprisonment. The Taliban sent death threats. The appellant fled Afghanistan in fear. He returned in 2018 because he was worried about his family. Hafeez is now the Taliban commander in his village.
5. The appellant was represented by counsel at the hearing in the First-tier Tribunal. He attended and gave evidence with the assistance of a Pushto interpreter. He submitted some copy documents to support his claim which were said to have emanated from the former Afghan government and the Taliban.

## **The judge's decision**

6. The judge dismissed the appeal on all grounds. As the challenge brought against the judge's decision focuses exclusively on his assessment of the protection claim and, in particular, the appellant's credibility, we shall confine our consideration to that part of the decision.
7. The judge set out his self-direction at [27] to [31]. He noted the lower standard of proof applicable and the need to make a holistic assessment of the evidence, including the documentary evidence. He reminded himself of the need for caution when assessing the plausibility of the behaviour of actors in a foreign country. The judge's self-direction has not been the subject of challenge. The grounds challenge the manner in which the judge applied it.
8. At [32] to [41] the judge set out his findings, which essentially consist of a series of reasons for rejecting the appellant's account. We shall only set out those paragraphs which have been highlighted in the grounds:
  - "33. It is not credible the Afghan army could have converged on the appellant's house within 25 minutes of the Taliban arriving, [AIR Q. 79], especially as the nearest police station was a 12-minute drive away, [AIR Q. 80].
  34. It is not credible the Taliban would suspect the appellant and his father of summoning the army when the appellant's father was in their presence until the gunfight took place and neither the appellant nor his father were aware the Taliban would be coming to their home.
  35. It is not credible the appellant could have escaped his home, evading both the Taliban and the army, given his assertion in his witness statement that the army had blocked the house."
9. The judge's other reasons, which have not been addressed in the grounds, dealt with the documents, the appellant's acquisition of an Afghan passport and his return to Afghanistan, the absence of supporting statements from the appellant's surviving family and matters which damaged the appellant's credibility by virtue of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

## **The issues on appeal to the Upper Tribunal**

10. Ground 1 argued that the judge's use of the expression "not credible" in each of [33] to [35] must be understood as meaning "not plausible". The judge erred by relying on what he perceived as being inherently improbable. At [33] he made dangerous assumptions about where the army had been and he had assumed they were at the police station. At [34] he imparted to the Taliban a degree of rationality which might not have been present. At [35] he made assumptions about the army's ability to surround the farm. The judge had based each finding on what he had regarded as reasonable and this was an erroneous approach.

11. Ground 2 argued that the judge's reasoning in [33] to [35] did not stand up to scrutiny. Regarding [33], it was not implausible that the army could arrive in 25 minutes if they travelled from a police station which was 12 minutes away. Regarding [34], it was not implausible the Taliban would suspect the appellant had called the authorities while he was out making tea. Regarding [35], the appellant explained he had escaped through a rear exit, which was a plausible explanation.
12. The grounds argue these errors were material notwithstanding the judge's other credibility points because these were the only ones bearing directly on the appellant's account.
13. Permission to appeal was granted on all grounds.
14. The respondent has not uploaded a rule 24 response. Ms Nwachuku confirmed the respondent opposed the appeal.
15. As should by now be familiar to all practitioners in this jurisdiction, new standard directions have been issued by the Upper Tribunal as of 25 September 2023. The core aspect of these directions is to require the party appealing to the Upper Tribunal to provide a composite bundle containing specified materials and in a proper format. The appellant had not filed a composite bundle in accordance with the timetable set. Mr Saleem apologised and suggested the reason was that his colleague had been unwell. He also believed a bundle had been uploaded the day before the hearing. As such, the purpose of the direction was defeated because it could not have arrived in time to be of assistance to the tribunal. In the circumstances, we indicated to Mr Saleem that we would consider how to address this failure after the hearing. In the event, we were notified after the hearing had concluded that a bundle had been received.
16. A bundle had been uploaded on the First-tier Tribunal's platform running to 902 pages. Ms Nwachuku had been able to prepare using that bundle and we were grateful for her assistance in navigating that bundle.
17. Having reflected on the appellant's failure to comply with the standard directions, we issue a direction at the end of this error of law decision.

### **The submissions**

18. Mr Saleem submitted the judge's findings at [33] to [35] were unsafe for the reasons highlighted in the grounds. He then went further and suggested the judge had erred by failing to provide an explanation and reasons for his findings. We queried whether he was seeking to make a reasons challenge, pointing out this was not how the grounds had been pleaded. He initially said he only relied on the written grounds but, when pressed further, confirmed that he did argue that the judge's decision lacked adequate reasons. He also said the judge's findings were unreasonable but clarified he was not also seeking to make a rationality challenge. He drew our attention to what the appellant had said in his

witness statement at [17] to [19], describing his father sending him to make tea and the arrival of the army.

19. Mr Saleem also submitted the judge had failed to make his assessment in the context of the background materials. Again, this was not a point made in the grounds of appeal on which permission had been granted. Mr Saleem maintained the judge ought to have recognised what the appellant said about Hafeez becoming a Taliban commander, although we pointed out that this would make no difference if the judge's core findings rejecting the account were sustainable.
20. Ms Nwachuku argued the judge had been entitled to make the findings he had made. She highlighted the judge's express self-direction as regards the risks of making plausibility findings in the context of a foreign country [31]. It was clear the judge was saying he did not believe the appellant's account. She argued the judge had based his assessment, not on his own perceptions of what was reasonable, but on what the appellant had said himself. She illustrated her point by reference to the appellant's responses at his interview. He was asked how far the nearest army base or police station was from his home and he had answered that it was 12 minutes' drive from Asadabad, without clarifying whether he was referring to the police station, army base or both [Q80].
21. Ms Nwachuku pointed out the appellant had been asked about why the Taliban would believe he had informed the authorities of their presence and the appellant had answered that they assumed this because there was no one else around [Q97]. We noted at this point that the appellant had given a different explanation in his witness statement, where he speculated it must have been a neighbour who had alerted the authorities [19]. Ms Nwachuku pointed out the judge had also relied on what the appellant had said about his escape. In his witness statement he described the army using a megaphone to state they had "blocked the house" [18].
22. Ms Nwachuku later conceded the judge might have erred in [33] because his reasoning did not stand up to scrutiny. However, she argued any error could not be material to the outcome of the appeal given the other credibility points were sustainable.
23. We asked Mr Saleem for assistance as to where the appellant lived in relation to Asadabad but he could not help us. We noted the home address he gave at his screening interview was a village in Kunar. He said he lived on his father's farm, which was large. Mr Saleem said the errors in the decision were material because they went to the core of the case.
24. Having heard full submissions we reserved our decision.

## **The law**

25. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact.

The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

- (i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
- ii) Failing to give reasons or any adequate reasons for findings on material matters;
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- iv) Giving weight to immaterial matters;
- v) Making a material misdirection of law on any material matter;
- vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

26. It is important, as has been repeatedly emphasised in many authorities, not to construe disagreements of fact as errors of law. See, for example, the Presidential Panel in Joseph (permission to appeal requirements) [2022] UKUT 218 (IAC) at [13].

27. The dangers of relying on inherent probability have been discussed in several cases. For example, in Gheisari v Secretary of State for the Home Department [2004] EWCA Civ 1854, Pill LJ said as follows:

"There will be cases where the events upon which a judgment has to be made are, in the experience of the decision-maker, inherently likely or inherently unlikely. That must be kept in mind when the assessment of credibility is made. That may be an important factor when making the decision. There will be cases where, on the particular evidence, a two stage process of reasoning is appropriate, an assessment of the background material and then a subsequent assessment of the credibility of the witness. Fact finding is, however, essentially a single process. Judgments are not to be made by rote. I would deplore a situation in which the fact finder must first decide whether the situation is inherently likely or unlikely and only then to address himself to the witness's credibility. The task of fact finding should not be compartmentalised in that way. Parts of the story may be inherently likely and parts inherently unlikely. The degree of likelihood may itself depend on witness assessment. What would be wrong would be to say, -- and I agree with Sedley LJ, -- that because evidence is inherently unlikely it inevitably follows that it is wrong. An unlikely description may, upon a consideration of the circumstances as a whole, including the judge's assessment of the witness and any explanations he gives, be a true one."

28. Then, in HK v Secretary of State for the Home Department [2006] EWCA Civ 1037, Neuberger LJ, as he then was, said as follows:

“28. Further, in many asylum cases, some, even most, of the appellant’s story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).

29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in Hathaway on Law of Refugee Status (1991) at page 81:

“In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability.”

30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in Awala -v- Secretary of State [2005] CSOH 73. At paragraph 22, he pointed out that it was “not proper to reject an applicant’s account merely on the basis that it is not credible or not plausible. To say that an applicant’s account is not credible is to state a conclusion” (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done “on reasonably drawn inferences and not simply on conjecture or speculation”. He went on to emphasise, as did Pill LJ in Ghaisari (sic), the entitlement of the fact-finder to rely “on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible”. However, he accepted that “there will be cases where actions which may appear implausible if judged by...Scottish standards, might be plausible when considered within the context of the applicant’s social and cultural background”.

### **Decision on error of law**

29. Having carefully considered the oral submissions made to us, the relevant parts of the judge’s decision and the parts of the evidence relied on by the parties, we have concluded that neither of the grounds relied on by the appellant in the original grounds or as expanded on by Mr Saleem in his submissions are made out. Our reasons are as follows.
30. Taking ground 1 first, we start by noting that the judge expressly reminded himself about the dangers of relying on inherent implausibility in [31]. He began his findings in the very next paragraph by stating he did

not find the appellant credible for a number of reasons. He then set out those reasons in a concise and structured way.

31. Ground 1 argues the judge's decision must be read as meaning that the three situations highlighted in [33] to [35] were inherently implausible. Of course, as explained in Gheisari, such an approach may be risky but is not necessarily erroneous provided the judge does not simply conclude that evidence must be rejected because it is inherently improbable. We do not see that the judge fell into that particular error.
32. All three paragraphs are concerned with aspects of a single incident. The manner in which the judge expressed himself at each of [33] to [35] ("It is not credible that ...") is challenged in the grounds on the basis that this betrays confusion on the part of the judge between considering something as implausible and rejecting the claim that it happened at all. We reject that argument, which was not developed by Mr Saleem at the hearing. The three paragraphs must be read in conjunction with [32] and, having done so, we consider that it is clear the judge is simply listing reasons for rejecting the claim. In the light of his self-direction, there is no basis for concluding that the judge was relying erroneously on what he deemed inherent improbability, as seen through the lens of someone with no understanding of the landscape, culture and customs applicable.
33. The case law provides guidance about the importance of assessing the plausibility of evidence against background evidence or expert evidence. Neither the grounds nor Mr Saleem highlighted any such evidence which the judge ought to have had in mind but did not. All the judge is doing is explaining the accumulation of reasons in his mind which led to his overall conclusion which was that the incident did not happen.
34. Paragraphs [34] and [35] are more about the application of common sense and are certainly not a product of flawed logic or understanding of the background evidence. It is certainly hard to understand the appellant's account that the Taliban would suspect the appellant's father of summoning the army given he did not expect Hafeez's visit, did not know he was a member of the Taliban and had no opportunity to contact the authorities between the arrival of Hafeez and being knocked out by a blow from a rifle butt. We noted the inconsistency between what the appellant said at his interview and what he said in his witness statement, although this was not relied on by the judge.
35. It is not impossible that a person can escape through an army cordon. However, the judge was entitled to regard this as insufficiently explained given the prevailing circumstances that the army had rushed to the scene to capture an armed Taliban group.
36. We acknowledge that Ms Nwachuku had concerns that [33] of the judge's decision was problematic. For our part, we do not consider that the judge's reasoning is erroneous. As explained above, the appellant's evidence was vague and, without knowing precisely where the appellant's father's farm



was located, the reference to the army base or police station being 12 minutes' away cannot be used as a reference point for the arrival of the army within 25 minutes of the arrival of Hafeez and his men. In other words, it was open to the judge to consider that the speedy response of the army was simply not credible.

37. As noted, Mr Saleem sought to expand the grounds to include a reasons challenge. This was not included in the grounds seeking permission to appeal and was not a ground on which permission to appeal has been granted. No application has been made to vary the grounds and we see no reason to permit Mr Saleem to do so. In any event, we do not regard the judge's explanations for his findings insufficiently reasoned. The judge's reasoning is concise but adequate. Moreover, each reason must be viewed as one of a series of reasons which led to the judge's overall credibility assessment.
38. Even if we were to agree that one or all of the three paragraphs in question contained an error of law for any of the reasons canvassed, we would nonetheless dismiss the appeal on the basis that the error(s) were not material to the outcome.
39. In Degorce v Commissioners for HMRC [2017] EWCA Civ 1427, Henderson LJ explained that it was difficult to envisage circumstances in which the Upper Tribunal could properly leave a decision of the First-tier Tribunal to stand once it is satisfied that the error of law might (not would) have made a difference to that decision. However, ultimately if there is an error of law but it is immaterial there would be no injustice in allowing the decision to stand. We see no basis for considering the decision of the judge could not stand even if the impugned paragraphs were found to be erroneous. The judge gave very cogent reasons at [36] to [41] for rejecting the claim and those reasons have not been challenged. Even without paragraphs [33] to [35], the judge gave ample sustainable reasons for rejecting the claim.
40. We therefore dismiss the appeal.

### **NOTICE OF DECISION**

The decision of the First-tier Tribunal did not involve the making of an error of law and shall stand.

### **DIRECTION**

**No later than 7 days** after this error of law decision is sent out to the parties, the Principal of Malik and Malik Solicitors shall provide a written explanation as to why the composite error of law bundle was not filed and served in compliance with the Tribunal's standard directions. That explanation shall be marked for the urgent attention of Upper Tribunal Judge Norton-Taylor.

Signed: N Froom

**Deputy Upper Tribunal Judge Froom**  
May 2024

Dated: 28