IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002239

First-tier Tribunal No: PA/53615/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27th of September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

BHK
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms H Masih of Counsel, instructed by Kothala & Co Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House by CVP to Birmingham on 11 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born on 1 January 1991. The appellant made submissions, claiming eligibility for refugee status, humanitarian protection, private and/or family life in the UK, dated 10 November 2022, which were refused by the respondent on 14 June 2023. His appeal against that decision was dismissed by First-tier Tribunal Judge Phull ("the judge") on 10 April 2024, following a hearing on 28 February 2024.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Cox, on 16 May 2024, on the basis that it was arguable that the judge had erred in law: the judge found that if the police had had an adverse interest in the appellant as he claims, they would have arrested him at the hospital or on his discharge. The judge noted that the appellant had stated that he did not have any documents from the police that they consider him to be a spy (Q75) and that the police had not approached his family since he left the country (Q79).

3. However, the judge also found that the summonses dated 5 June 2022 and 5 November 2021 had been issued by the Ministry of Interior Affairs, Baghlan Province, Police in charge of Baghlan Province, and not the Taliban [33].

4. The permission judge indicated that having found that the police issued the summonses, it was arguably incumbent upon the judge to go on to consider whether, in 2022, the authorities may have considered the appellant to be a spy, particularly as the Taliban were in power by that date.

5. The permission judge also found it arguable that the judge had acted unfairly in not allowing the appellant an opportunity to explain why the police had issued the summonses, but the Taliban had taken those summonses to the family home.

6. Permission was granted on all grounds given that the primary issue was the appellant's credibility.

7. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and thus whether the decision should be set aside.

Submissions – Error of Law

8. In the grounds of appeal and in oral submissions by Ms Masih it was argued in short summary for the appellant as follows:

9. It was submitted that the judge's findings at [27], [28], [31], [32], [34], [35], [38] and [40], that the appellant had not established that he was a target for the Taliban or the police for being a spy, were inconsistent with the positive finding at [33] that the "summonses" dated 5 June 2022 and 5 November 2021 (as found in the respondent's bundle) (RB pages 34 to 37) had been issued by the Ministry of Interior Affairs, Baghlan Province.

10. It was submitted that it was the appellant's evidence that the Taliban visited his home in 2021 and 2022 looking for him, after his name had appeared on a wanted person's list, initially in 2021, requiring him to present himself at the police headquarters for questioning, and that having failed to do so a warrant

was issued in 2022 sentencing him to death as a spy (RB 34 to 37). It was submitted therefore that the judge, having accepted that the summonses/warrants were issued as claimed, failed to provide cogent reasons as to why that significant corroborating evidence which the judge accepted, failed to establish that the appellant was at risk on return as claimed and therefore these inconsistent findings rendered the decision unsafe. Ms Masih pointed out that at no stage in his findings did the judge find that the summonses provided by the appellant were unreliable.

11. Ms Masih submitted that it was clear that the judge accepted the summonses, having found at [33] as follows:

> "However, I find the summons dated 5 June 2022 and 5 November 2021, have been issued by the Ministry of Interior Affairs, Baghlan Province, Police in charge of Baghlan Province, and are not the Taliban (page 36 to 37 SB).
>
> The appellant does not explain in his statement, why the summons are from the Baghlan police, but left with his family by the Taliban."

12. Although Ms Masih noted that the judge went on to not attach weight to the summonses, at [34] she submitted that at no stage did the judge say that the documents themselves were unreliable. What the judge said at [34] in general terms was that the appellant had not satisfied her that he had been accused of being a spy by either the Taliban or the Afghan authorities "for the reasons considered above" and therefore did not attach weight to the summonses. It was submitted that the judge failed to consider the evidence in the round and had failed to attach weight to the summonses because she had already reached negative credibility findings against the appellant. Crucially nothing discrete had been identified about the summonses that might say they were unreliable, and it was incumbent therefore on the judge to reach a clear finding if she was finding against the appellant on these documents, which she had appeared to accept at [33].

13. It was further argued that the judge's findings disclosed procedural impropriety, as the judge raised a point for the first time in the determination, not raised with the representatives or the appellant at [33] where the judge stated that the appellant did not explain in his statement why the summonses were from the Baghlan police but left with his family by the Taliban. It was submitted that if the judge was minded to find against the appellant on this point, in fairness, this should have been canvassed with the appellant at the hearing, as the judge had done on other matters.

14. It was submitted that the question in the judge's mind, as revealed in her findings at [33], as to why the police issued the summonses/warrants but the Taliban delivered them to the appellant's family, clearly reflected adversely on the appellant's credibility in a significant way. Therefore, this was a point which should have been raised by the judge with the appellant and his representative. It was submitted that the failure to alert the appellant and his representative to this was procedurally unfair. It was submitted that this was not an obvious point, and it could not have been anticipated that the judge would have taken this particular point against the appellant. This was because firstly it was not a point made by the respondent, and secondly the judge's (silent) concern failed to appreciate that which was not disputed, that the Taliban had taken over Afghanistan on 15 August 2021, before the summonses/warrants were issued. Accordingly, it was submitted that there was every reason to believe that the

Taliban were in control of state organs, such as the police when the summonses/ warrants were issued and therefore there was no inconsistency in a summons being issued by the police and delivered by the Taliban.

15. It was submitted that the judge's findings did not point to any evidence to the contrary and that had the judge aired this issue the appellant may have been able to address any remaining concerns. It was submitted that there was nothing unusual about the way in which the summonses/warrants were issued and delivered. Therefore, it was submitted that the judge's approach at [34] in attaching no weight to the summonses and warrants was entirely erroneous.

16. It was further submitted that the judge had put the cart before the horse as a consequence of her finding that she could not attach weight to these documents because in the judge's mind the appellant had not sufficiently explained why they were issued by the police and delivered by the Taliban.

17. Ms Masih submitted that effectively there was an overlap in the errors made by the judge which were material and resulted in the decision being wholly unsustainable. Ms Masih relied on her grounds, including that the judge's preoccupation with the claimed absence of corroborating evidence to support aspects of the appellant's claims at [27], [29], [30] and [32] arguably imposed too high a burden of proof given that it is trite law that corroboration is not required. It was not disputed that the absence of corroboration in itself is not a basis for rejecting credibility. Equally, it was submitted that when the appellant had provided compelling evidence, namely the summonses/warrants evidencing risk to him on account of him having been accused of being a spy, which were capable of informing the core of his account, the judge had been quick to dismiss this evidence, only considering it after she had made adverse credibility findings rather than considering the documentary evidence as informing the credibility assessment.

18. Ms Masih further submitted that in rejecting the oral evidence of the appellant's sister, who learned of the Taliban threat to the appellant's life from her mother and sister-in-law as detailed in the decision at [30], the judge looked for further corroboration, namely evidence of those communications from five years earlier with no adequate reasons provided why the sister's oral testimony was to be disbelieved. Ms Masih submitted that this mirrored the incorrect approach taken by the judge at [34] in coming to conclusions on credibility and then subsequently not affording weight to other evidence. Ms Masih submitted that the judge had sought evidence of a similar age, five years previous but when such evidence was before her in the appellant's favour, from his sister, she did not afford weight to that evidence because of its age.

19. It was further submitted that the judge erred in rejecting the appellant's claim to be at risk on account of him returning from the west, in her findings at [36]. Ms Masih submitted that the judge drew solely on the absence of a threat to the appellant when he had returned to Afghanistan in 2017 as her basis for rejecting this aspect of his claim. It was submitted, relying on the grounds, that in doing so the judge overlooked material background evidence which was relevant to the profile of persons perceived as "westernised" following the Taliban takeover. Ms Masih relied on her skeleton argument (ASA) in particular [8] to [10], [13] and [18] to [19], which had been before the First-tier Tribunal.

20. Accordingly, Ms Masih submitted that the judge had misdirected herself by failing to consider the relevance of the change in circumstances in Afghanistan

since the Taliban took power in August 2021 and how this related to the plausibility of the appellant's claim to not being able to return there safely now. In particular, Ms Masih relied on [18] of the ASA and the CPIN that was before the judge, which detailed how those who left Afghanistan are perceived, for example that "A good Muslim would not leave". Given the change in landscape in Afghanistan, what the judge did not do was consider the potential for risk on return based on country conditions, focusing rather on the fact that the appellant had been able to safely return in 2017, which was not the only relevant issue, it being submitted that, for example, the Taliban were in control of the airport.

21. Finally it was argued that the judge's finding at [39] that the appellant did not qualify for humanitarian protection or would not suffer serious harm under Articles 2 or 3 of the ECHR lacked proper assessment. It was argued that the judge had failed to assess the risk to the appellant in light of the background material before her including the UNHCR Guidance on returns dated August 2022 and the Amnesty International Report which pointed to a decline in general security in the humanitarian situation in Afghanistan since the takeover by the Taliban and the further information since the most recent country guidance of **AS (Safety of Kabul) Afghanistan [2020] UKUT 130 (IAC)**. It was argued that it was incumbent on the judge to consider the background material including, as cited in the ASA, in giving reasons why she found it was safe for the appellant to return to Baghlan or relocate to Kabul, it being submitted that the judge had fallen foul of **MK (duty to give reasons) Pakistan [2013] UKUT 641**.

22. Although there was no Rule 24 response, in oral submissions by Ms Nolan for the respondent, it was argued in short summary as follows.

23. In relation to ground 1 Ms Nolan submitted that there were no inconsistent findings; the judge had set out at [33] that the summons was issued by the police not the Taliban, but went on to find at [34] that she was not satisfied that the appellant had been accused of being a spy.

24. Ms Nolan submitted that the judge had clearly made a number of negative credibility findings against the appellant. At [27] the judge found that the appellant did not satisfy her that the Taliban or the authorities had an adverse interest in him, that he had been accused of being a spy.

25. Ms Nolan noted that the judge also made negative credibility findings at [28] in relation to the appellant's claim to have stayed with a relative for two to three nights not being credible due to the lack of any evidence to support that claim and that the appellant had remained in Afghanistan from 2017 to 2019, but had not provided any evidence from his family in relation to any claimed threats.

26. The judge also found at [30] that it was the appellant's evidence that after he was shot he was taken to hospital and treated and that the police turned up and took a statement for him yet the appellant had not provided evidence from the neighbour or any medical records to support this claim, it being the judge's finding that if the authorities had had an adverse interest in the appellant as claimed for being a spy, there would have been evidence to suggest that he had had problems with the police when he turned up at the hospital, which was not his claim. The judge also highlighted the claimed inconsistencies in the appellant's evidence at [31], the judge finding that if the Taliban and the police had had a genuine adverse interest in him for being a spy, they would have heard of the appellant's return and would have located him during that period.

27. Ms Nolan submitted that it was a "bit of a reach" to state that the judge had made a positive finding in relation to the summons. All that the judge said was it was issued by the Ministry of Internal Affairs, not the Taliban, before going on to find that no weight should be attached to those documents, and it was submitted that this finding was not inconsistent.

28. In terms of ground 2 and the claimed procedural impropriety Ms Nolan submitted that although this was not put to the appellant nor raised at the hearing, what the judge said at [33] is that the appellant did not explain in his statement why this was issued by the police but left by the Taliban. Ms Nolan submitted that this was not a significant point when considered in the context of a number of adverse findings made against the appellant. It was Ms Nolan's submission that this was not the only point on which the appeal was being dismissed and therefore it was not procedurally improper of the judge not to put this to the appellant.

29. In terms of ground 3, Ms Nolan submitted that whilst it was argued that there was improper treatment of the evidence, Ms Nolan submitted that the Tribunal should find that as a whole, the judge had properly considered all the evidence. It was open to the judge to find that the evidence of the appellant's sister, as recorded at [30] did not take the matter further and what weight to be attached to the evidence was a matter for the judge, with Ms Nolan drawing the Tribunal's attention to **Volpi & Anor v Volpi [2022] EWCA Civ 464** paragraph 2(4) in term of the validity of findings of the judge, and that weight is a matter for the judge.

30. Considering ground 4, Ms Nolan noted that the judge was criticised for failing to consider the change of circumstances due to westernisation. However, Ms Nolan submitted the judge gave adequate reasons at [35] based on the fact that the family, including his brother in Baghlan had no problems and the judge at [37] considered **AS (Safety of Kabul) Afghanistan CG [2018] UKUT --118** and was satisfied that the appellant could return to his village, including as he had not satisfied the Tribunal that he was alleged to be a spy. The judge also took into account that the appellant returned from the west in 2017.

31. Although Ms Masih relied on her skeleton argument, Ms Nolan pointed out that in the skeleton argument the only point made in relation to westernisation was the fact that the appellant had lived outside Afghanistan for four years. There were no submissions made in relation, for example, to western dress or not following his religion and in all the circumstances it was submitted that the judge had given adequate reasons why the appellant would not come to adverse attention in returning from the West.

32. Finally in relation to risk on return, and claimed failure to assess evidence, Ms Nolan submitted the judge considered all the evidence. She did not accept that the appellant was of interest to the Taliban or the Afghan authorities based on claimed perception of the appellant as a spy. Ms Nolan submitted therefore that the judge did not reference the objective evidence set out in the appeal skeleton argument primarily because the judge did not find the appellant credible to the core of his claim and there was no need therefore for the judge to discuss this evidence. Therefore, it was submitted that ground 5 did not disclose any material error.

Conclusions Error of Law

33. As I indicated at the hearing I was satisfied that the judge fell into error in her approach to the assessment of credibility. Whilst it is immaterial what order a judge deals with evidence, the decision of the First-tier Tribunal fell into the type of error considered in **Mbanga v Secretary of State 2005] EWCA Civ 367**. Wilson LJ in **Mbanga** provided the following advice:

"What the fact finder does at his peril is to reach a conclusion by reference only to the applicant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence."

34. The judge reached negative credibility findings first, before considering the documentary evidence provided by the appellant, seeking to justify those conclusions, without providing adequate reasons for placing little weight on the summons' evidence.

35. The judge's negative credibility findings, including at [23], [25], [26], [27], [31] and [32] those findings appeared to taint her approach, at [34] to the summonses/warrants before her rather than taking into account all of the evidence in the round, including the summonses produced and then reaching her findings with the judge finding that 'the Appellant does not satisfy that he has been accused of being a spy by the Taliban or the Afghan authorities for the reasons considered above, and therefore I do not attach any weight to the summons filed in evidence.'

36. In addition to the 'reasons considered above' being the judge's negative credibility findings, thus disclosing an improper approach to the assessment of credibility, part of those "reasons considered above" included the judge's findings at [33] that the summonses issued on 5 June 2022 and 5 November 2021 had been issued by the Ministry of Interior Affairs of Baghlan Province and not the Taliban; the judge making adverse findings that the appellant had failed to explain in the statement why they came from the Baghlan Police but were left with his family by the Taliban.

37. Although Ms Nolan valiantly attempted to defend the judge's findings, including submitting that it was a stretch to state that positive findings had been made on the summons, given the judge's clear statement that the summonses had been issued by the Ministry of Interior Affairs, Baghlan Province, police in charge of Baghlan Province, the judge fell into material error in failing to explain why, if the authorities in the form of the police appeared to have interest in the appellant in 2022, the appellant would not be at risk on return.

38. It was a core tenet of the judge's findings that if the police had had adverse interest in the appellant as he claims, he would have been arrested at the hospital or on his discharge, with the judge noting that the appellant had stated that he did not have any documents from the police and that the police had not approached his family since he left the country

39. The judge's finding on credibility do not contain adequate reasoning as to why given what might fairly be seen to be positive findings of an official police summonses issued in June 2022 and November 2021, which could be considered an adverse interest in the appellant, the appellant would not be at risk.

40. The judge also fell into material error in this context, in not allowing the appellant an opportunity to address her concern in relation to the Taliban delivering the warrant and summonses, which were patently material to the judge's ultimate conclusions against the appellant.

41. It is apparent that the judge also failed to appreciate in her findings at [33], that the Taliban had taken over Afghanistan by the time the first summons was issued with the judge's findings failing to point to any evidence which would suggest that what happened, the summons being issued by the police authorities but officially delivered by the Taliban, was anything other than the normal state of affairs given that the Taliban were in power at the time the summons was issued.

42. The judge's errors are compounded by, on the one hand, appearing to require corroboration and making negative findings against the appellant for lack of corroboration and, on the other, failing to accept as corroborative the oral evidence from the appellant's sister, dismissing this evidence for lack of further corroboration and on the basis of its age, whereas the judge appeared content to seek evidence of similar age as corroboration for other claims of the appellant that she did not accept.

43. In addition, the judge's approach to the evidence before her of the change in circumstances in Afghanistan, in primarily dismissing the appellant's concerns of risk on return because of his ability to live safely in Afghanistan from 2017 to 2019, does not adequately addressing how the change in circumstances since that date, with the Taliban having taken over in August 2021, might impact this appellant and his ability to safely return.

44. For these reasons therefore the making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law such that the decision must be set aside.

45. Given the nature of those errors, including that there was procedural unfairness, a full remaking of the appellants' appeals is required. As to disposal, I have considered the Court of Appeal's decision in **AEB v SSHD [2022] EWCA Civ 1512,** the Upper Tribunal's decision in **Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)** and 7.2 of the Senior President's Practice Statements. I am satisfied that the nature and extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal de novo, Birmingham Hearing Centre other than before Judge Phull.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 September 2024