Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08835/2012

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 9 October 2013	**On 28 October 2013**
	…………………………………

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

M S

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Paxton instructed by Virgo Consultancy Services Limited
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Afghanistan who was born in 1989. The appellant arrived in the United Kingdom on 1 March 2011 with a student visa. His partner ("SM") came to the UK with their infant son on 1 August 2012. She came from

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Belgium where she had claimed asylum. On 4 September 2012, the appellant claimed asylum. On 12 September 2012, the Secretary of State refused the appellant's application for asylum and made a decision to remove him by way of directions to Afghanistan.

3. The appellant appealed to the First-tier Tribunal. Following a hearing on 20 November 2012, Judge Alakija dismissed the appellant's appeal on asylum and humanitarian protection grounds and under Articles 2, 3 and 8 of the ECHR. First, the Judge rejected the appellant's claim that he was at risk of persecution or serious ill-treatment from Islamic extremists or insurgents such as the Taliban because he had worked for a security company in Afghanistan ("AGI"). Secondly, the Judge rejected the appellant's claim to fear the family of his unmarried partner "SM" and the Afghan authorities because he and "SM" had a child born out of wedlock. Finally, the Judge concluded that the appellant's removal would not be a breach of Article 8.

4. The appellant sought permission to appeal to the Upper Tribunal. The application identifies 15 grounds upon which it was argued that the Judge had erred in law. On 19 December 2012, the First-tier Tribunal (Judge Davey) granted the appellant permission to appeal. Thus the appeal came before me.

5. Mr Paxton, who represented the appellant, developed in his oral submissions the grounds upon which permission to appeal had been sought. He did so at some length and with some effect because at the conclusion of his submissions, Mr Richards who represented the respondent indicated that he accepted that there were a number of errors in the Judge's decision and he did not seek to uphold the determination.

6. In the light of that, I can briefly identify the clear errors that lead me to conclude that the Judge's decision cannot stand.

7. First, the Judge failed to take into account evidence relevant to a core part of the appellant's claim to be at risk on return and to make findings on the evidence of one of the appellant's witnesses.

8. It was the appellant's contention that he worked for a security firm (AGI). In support of that, the appellant called two witnesses ("SA" and "SM") who claimed to have worked for AGI and stated that the appellant had worked for AGI. In addition, the appellant produced a substantial body of documentary evidence (at pages 69-98 of the appellant's bundle) in support of his claim to have worked for AGI and as a result to have faced in the past (and will do so in the future) persecution from Islamic extremists. The appellant also relied on a DVD which showed the appellant standing near a vehicle wearing protective clothing such as a flak jacket.

9. The Judge set out the evidence of one witness ("SA") at paras 11 and 12. He set out the evidence of the other witness ("SM") at para 13. As regards "SA" at para 28 the Judge found that he was not credible on the basis that he had accepted in his

evidence that he had been untruthful about money he had loaned to the appellant. The Judge made no finding in relation to the credibility of "SM". The only further reference to either witnesses evidence is found in para 32 where the Judge says:

> "32. I find it hard to believe that any company where it and its employees maybe under threat are naïve and lax enough to employ people without any security checks. Given the known problems in Afghanistan such a policy would almost certainly be considered to be dangerous and irresponsible."

10. That is a reference to the evidence of "SA" that he had been employed by AGI on the recommendation of the appellant without security checks.

11. He dealt with the DVD evidence at para 31. As regards the DVD, the Judge commented:

> "31. I was shown a DVD in which the appellant is seen in a vehicle wearing what appeared to be some sort of protective clothing such as a flak jacket. I do not find that particularly surprising given that there are known to be certain potential dangers for persons working for the allies whilst they are working for them and it is likely to be company policy that such clothing should be worn."

12. It is not entirely clear what point the Judge is making here other than to confirm that the evidence is consistent with the appellant's claim to have worked for "the allies" in the sense of a security company in Afghanistan.

13. Even if the Judge was entitled not to accept the evidence of "SA", he failed to make any finding in relation to "SM". It is difficult to read any of the Judge's reasons as justifying a finding that he did not believe "SM". That amounted to an error of law. In addition, the Judge clearly failed to take into account the relevant material at paged 69-98 of the appellant's bundle relevant to his claim to work for AGI.

14. Even if the Judge was entitled (as he did in para 32) to doubt the evidence of "SA" and the appellant on the basis that it was implausible that they would be employed without security checks, the Judge's failure to take into account all the relevant evidence and to make any finding in relation to the supporting evidence in the DVD were material errors of law which make the adverse credibility finding unsustainable.

15. Secondly, as regards the appellant's claim based upon his relationship with "SM" and their child born out of wedlock, at para 36 the Judge said this:

> "36. Whilst there is no evidence to show that the appellant and his partner are married there is also no evidence provided to show the reason why they could not and indeed have not married since they have been in the UK."

16. Leaving aside that there was evidence that they were not married – namely that of the appellant and "SB" in her witness statement – the Judge imposed an impossible burden upon the appellant, namely to show that he has <u>not</u> married

since he has been in the UK. It is difficult to see what evidence could be produced to prove that negative. The Judge's reasoning is, in my judgement, unsustainable.

17. Thirdly, in relation to the Article 8 claim, the appellant's case was that "SM" suffered from mental health problems. At para 29, in relation to that, the Judge said this:

> "29. There is no medical evidence before me which specifically applies to the appellant's partner. An e-mail with no patient identification can be given no weight whatsoever and in any event the content of that e-mail would be of no assistance in assessing medical matters as far as any individual was concerned."

18. That is a reference to an e-mail found at page 133 of the appellant's bundle. It is written by a "Paul Jones" who is described as a "Medical Summariser" at the Cardiff Royal Infirmary. It is addressed to a representative at Virgo Consultancy. It states as follows:

> "As per telephone call in relation to the patient we discussed.
>
> I can confirm the patient has a section 2 form completed by Dr Andrew Glasgow on Friday 16 November, this form is for the compulsory admission as an in-patient to a Mental Health Hospital and as far as we are aware the patient has not been discharged from the hospital as of yet.
>
> I can also confirm if you wish to have a copy of the patient's medical notes then a fee of £30 will be incurred."

19. Whilst it is true that this email does not identify the appellant's partner by name it does contain as its subject the follows:

> "Ref: MOH0075-1-0".

20. As Mr Paxton pointed out, that is at least consistent with the name of the appellant's partner. He also submitted that if this document does not relate to the appellant's partner then it is tantamount to saying that the appellant's legal representatives had attempted to mislead the Court. I accept those submissions. It was irrational to take the view, in all the circumstances that this document (which is undoubtedly genuine) did not relate to the appellant's partner. Further, it indicated, as relevant to the Article 8 claim that she was subject to compulsory admission under the Mental Health Act 1983. In my judgement, the Judge was not entitled, as he put it in para 29, to give this evidence "no weight whatsoever".

21. Fourthly, the grounds argue that the Judge refused to permit the appellant's Counsel to ask the appellant questions following the adoption of his statement, on matters relating to his risk on return. The Judge only permitted Counsel to deal with matters concerning the appellant's partner's admission to hospital. Mr Paxton told me that the Judge indicated that any such evidence had to be produced in the form of a written witness statement. The Judge invited Counsel

(who was also Mr Paxton) to do so but he declined as that was not practical at the hearing.

22. It has not been possible to obtain the comments of the Judge who has, since the hearing, retired. Mr Richards did not seek to suggest, based upon any record of the Presenting Officer at the hearing that the circumstances were other than as Mr Paxton presented them.

23. In my judgement, there are real difficulties with the Judge's approach. Of course, in an ideal world all evidence-in-chief would be presented in the form of written witness statements. In this case, the bulk of the appellant's evidence was in that form and Mr Paxton wished to raise some further matters which, as I understand it, he felt had not been dealt with in the witness statement appropriately. Whilst, in some circumstances, it might be both practical and reasonable for a Judge to require a further short additional witness statement to be prepared, that will not always be the case. The procedure of the First-tier Tribunal is certainly sufficiently flexible to allow for the oral elucidation of further points not dealt with in the witness statement. Counsel, not attended by instructing solicitors, may well find it difficult to take a witness statement from an appellant whose first language is not English. The difficulties are obvious both in terms of taking the instruction and ensuring that what is recorded in the written statement is accurate and understood by the appellant. In the circumstances of this appeal, I have concluded that it was unfair to require a witness statement rather than allow the appellant to be asked questions and provide evidence through his oral answers. However, even if I were wrong about that, the First-tier Tribunal's decision cannot stand for the reasons I have already given.

24. In these circumstances, I do no need to deal in any detail with Mr Paxton's submission that the proceedings were unfair because there were difficulties with the interpretation (as the interpreter was from Iran rather than Afghanistan) and it was unfair for the Judge to require the appellant to give his evidence in English and then to make adverse credibility findings on the basis of that evidence. Suffice it for me to say, that had it been necessary to decide this point I would not have accepted Mr Paxton's submissions. The Judge set out his reasons for continuing that hearing in the way I have described at paras 3-5 of his determination. I note what the appellant says in his witness statement dated 8 May 2013 at paras 39-41 that he "felt the greatest stress at having to give his evidence in English and that that had had "an adverse impact on the quality of the delivery of my evidence". Although the appellant stated, when asked by the Judge that he was "not 100%" happy as he had not been able to communicate the responses he wished, none of the Judge's reasoning relies upon any inconsistencies in the appellant's evidence or, as Mr Paxton suggested in his submission was the case, that the Judge had assessed the "demeanour" of the appellant. The only reference in the Judge's decision is at para 37 where he says:

> "37. Irrespective of any issues regarding credibility due to the appellant's behaviour, inconsistencies and discrepancies in his evidence I find that even if I accept the core of his story is true he does not qualify as a refugee. "

25. Although the Judge said this in para 37, his earlier reasoning does not in fact rely upon "the appellant's behaviour, inconsistencies and discrepancies in his evidence". Indeed the weight of Mr Paxton's submissions was that the Judge had failed to give adequate reasons and make findings on significant parts of the evidence.

Decision and Disposal

26. For the reasons I have given above, the Judge's decision to dismiss the appellant's appeal involved the making of an error of law and the decision cannot stand. The errors infect both the Judge's decision in relation to the appellant's international protection claims and also under Article 8 of the ECHR.

27. I was invited to remit the appeal to the First-tier Tribunal. Given that a *de novo* hearing is required, and the nature and extent of the fact finding required, in accordance with para 7.2 of the Senior President's Practice Statements it is appropriate to remit this appeal to the First-tier Tribunal in order that the decision can be remade.

28. Accordingly, the appeal is remitted to the First-tier Tribunal to be heard *de novo*.

Signed

A Grubb
Judge of the Upper Tribunal

Date: