Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08602/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2015

Decision and Reasons Promulgated
On 21 December 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

RH
[Anonymity direction made]

Claimant

Representation:

For the claimant: Mr A Vaughan, instructed by Duncan Lewis & Co
For the respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, RH, date of birth 15.11.96, is a citizen of Afghanistan.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Lall promulgated 10.6.15, allowing on all grounds the claimant's appeal against the decision of the Secretary of State, dated 7.10.14, to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 4.6.15.

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3. First-tier Tribunal Judge Osborne refused permission to appeal on 30.6.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Grubb granted permission to appeal on 18.8.15.

4. Thus the matter came before me on 7.12.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Lall should be set aside.

6. The relevant background can be summarised briefly as follows. The claim is that the Taliban came to the claimant's village in Nangarhar Province trying to recruit him. His father always refused, but one night they returned when he was not there, beat and abducted him to the mountains, where he was trained to use a suicide vest. After some 20 days he took the opportunity to escape and returned to his family. After a few days he was abducted a second time; he believed this was by the Taliban, but it appears to have been an agent engaged to help him flee Afghanistan. In November 2010 he claims to have travelled some 2-3 months in a single lorry without ever getting out, until Kent Police apprehended him on 22.2.11, whereupon he claimed asylum. He claims to fear return to Afghanistan on the basis that he would be mistreated due to his imputed political opinion. He claims that the Taliban will force him to become a suicide bomber.

7. His asylum claim was refused in April 2011, but because of his age he was granted discretionary leave to remain until 12.4.14. On 8.4.14 he submitted an application for further leave to remain. The Secretary of State considered that his renewed application was not a fresh claim, as no new issues have been raised since the refusal decision of 13.4.11, the application was again refused.

8. Judge Lall found the claimant credible and consistent, accepting that the Taliban abducted him. The judge also found that if returned to Kabul he would be without family or tribal protection, rendering such unduly harsh. In the brief §27 the judge relied on the same reasons to find the claimant faced a threat of serious harm on return. The judge then went straight on to conduct a Razgar Article 8 ECHR assessment, without even mentioning the Rules in relation to private and family life, concluding that the claimant has both a private and family life with his uncle and family in the UK and "there is nothing to suggest that it would be contrary to the public interest to allow this appeal on this additional ground as well."

9. The grounds assert that the judge failed to give adequate reasons for findings on material matter, and made misdirection in law. It is asserted that he failed to provide adequate reasons to find the appellant's account credible and failed to consider the contention that even if taken at its highest the claimant would not be at risk of persecution on return due to imputed political opinion. No consideration was given to the availability of sufficiency of protection or to internal relocation. There was no consideration of the Rules in relation to private and family life before the judge

engaged in a freewheeling Article 8 assessment. Further, there was no substantive consideration of the public interest considerations of section 117B of the 2002 Act.

10. The judge allowed the appeal on all grounds, asylum, humanitarian protect, and under Article 8 ECHR. Allowing the appeal on all three grounds itself is an error of law, as humanitarian protection is only available for those who are not refugees.

11. However, I find little force in the ground of appeal as to reasons for credibility findings. Ms Brocklesby-Weller submitted that the judge failed to engage with the adoption in the second refusal decision of the plausibility issues taken against the claimant in the first refusal decision, particularly in relation to his return home after escape and forced recruitment to the Taliban. It is clear from §15 to §18 that the judge has considered submissions on these issues before reaching findings and in particular that at §21 that his escape was not intrinsically incredible and remained consistent in his various accounts.

12. The second ground submits that inadequate reasons were given for finding that the claimant is now at risk of return in 2015, involving considerations of sufficiency of protection and internal relocation. At §26 the judge found he would be returning without family or tribal protection and it would be unduly harsh to require him to do so, stating, "He would be returning, as an escapee would-be suicide bomber from the Taleban, also originating from an insurgency area and in the absence of any familial or Tribunal protection he would be at real risk of persecution because of this." However, the judge failed to identify any identifiable reasons why the claimant would be at risk on return, or why he would be able to be identified as a would-be suicide bomber if relocating. Mr Vaughan submitted that there is no purpose in considering sufficiency of protection as the alleged risk is from the government, but that was not the finding of the judge. Had the judge considered there to be a risk from the state he would not have addressed the risk of relocation.

13. In summary, I find that the judge has failed to justify by any cogent reasons why he would be at risk from the government on return; simply because he came from an area of insurgency is hardly sufficient. In the context of the background evidence of limited forced recruitment by the Taliban, as referred to in the refusal decision, the judge failed to explain why the claimant would now be at risk in the light of that material and to address whether the state could or would provide a sufficiency of protection against any risk to the claimant from the Taliban. Neither is there any sufficient reasoning as to why the judge considered it would be unduly harsh to expect him to relocate. Although the judge gave some reasons at §26 for concluding that the claimant could not reasonably be expected to relocate to Kabul, the reasoning is entirely inadequate. In the circumstances, I find this amounts to a clear and material error of law.

14. I also find that before embarking on an Article 8 ECHR assessment of private and family life, the judge failed to consider the Rules in relation to private and family life, including Appendix FM and paragraph 276ADE, and in fact failed to demonstrate any compelling circumstances justifying a consideration outside the Rules under

Article 8 ECHR. Before considering Article 8 family and private life outside the Rules, I have to consider whether the private and family life circumstances of the claimant and her family members are so compelling and insufficiently recognised in the Rules so as to render the decision of the Secretary of State unjustifiably harsh so as to require, exceptionally, the appeal to be allowed outside the Rules on the basis of Article 8 ECHR. In SS (Congo) [2015] EWCA Civ 387 and Singh v SSHD [2015] EWCA Civ 74 the Court of Appeal held that whilst there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage of consideration outside the Rules on the basis of Article 8 ECHR, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of Article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules. Those cases also identified the test as that of compelling circumstances.

15. It is certainly possible for a judge to conclude there is family life between the claimant and his uncle's family, but I find the Razgar assessment and in particular the proportionality assessment was flawed.

16. At the very least, that the claimant could not meet the Rules was not brought into the proportionality balancing exercise, rendering the assessment as flawed.

17. It is also clear that the treatment of section 117B was entirely inadequate, stating only that the Tribunal has had regard to the public interest considerations, without bringing any of those factors into play in the proportionality assessment.

18. In effect, even if an Article 8 ECHR assessment outside the Rules was justified, the proportionality balancing exercise was deficient and failed to take proper account of relevant factors in favour of the public interest and removal of the claimant. I find this to be a material error vitiating the assessment and conclusions therefrom, such that I have reached the conclusion that the decision cannot stand and must be set aside to be remade.

19. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

20. In all the circumstances, I consider it appropriate to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing. The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-

made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusion & Decision:

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the making of the decision in the appeal to be heard afresh in the First-tier Tribunal.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Directions

1. The appeal is remitted to the First-tier Tribunal to be heard afresh, with no findings of fact preserved.
2. It may be listed before any First-tier Tribunal Judge, except Judge Lall.
3. The estimated length of hearing is 3 hours.
4. The claimant must advise within 14 days whether an interpreter is required and if so in what language.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an anonymity order. Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated