



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04062/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8th May 2017

Decision & Reasons Promulgated
On 31st May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

NS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Harding of Counsel, instructed by J McCarthy Solicitors
For the Respondent: Mr Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Munonyedi sitting at Taylor House on 25th November 2016 whereby she dismissed the Appellant's appeal on protection and human rights grounds by way of a determination promulgated on 11th January 2017.
2. Permission to appeal was granted by Deputy Upper Tribunal Judge Sheridan where it was said in relation to the grounds as a whole that the majority appeared weak but that permission be granted on all grounds. The focus of the grant of permission was as follows

“It is arguable that the judge erred in law by failing to consider the objective evidence about the current situation in Afghanistan that was adduced by the Appellant. The judge appears to have relied solely on the 2012 country guidance case in evaluating the risk of harm in Afghanistan. Given this guidance is over four years old it was arguably an error of law to not consider the more up-to-date information that was before the Tribunal including the UNHCR guidelines referred to in the grounds”.

3. The grounds, well drafted by Mr Harding, set out several aspects where it was said that there were material errors of law. Firstly, it was alleged in respect of the substantive asylum interview, there was not the inconsistency in the reply to question 38 which the judge had found there to be. It is said that paragraphs 16 and 17 of the judge’s decision amounted to a cross-cultural comparison based on assumptions on how village elders would behave but without any reference to background material. It was said that in reality in relation many findings of fact were not actually findings at all.
4. There was an age dispute in respect of the Appellant’s age. This raised issues in respect of the duties owed by the local authority. There was a medical report from Dr Diana Birch. The grounds of appeal to the Tribunal suggest that there was a material error of law in the way in which the age assessment had been looked at by the First-tier Tribunal Judge. Overall, it was said that the reasons given in rejecting credibility were not impressive and suggested a misapplication of the lower standard of proof. By way of example, paragraph 27 of the judge’s decision suggested a fundamental misunderstanding of the lower standard of proof which applies to this sort of case.
5. Insofar as the background material is concerned Mr Harding said he had handed in a bundle of background material to Judge. This morning he took me to certain aspects of that bundle, in particular a report by the UNHCR entitled “Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan”. It is dated April 2016. I say from the outset that UNHCR guidelines are just that and do not have to be followed. The guidelines are therefore a piece of evidence just as is any other that is presented to the Tribunal which then requires assessment, evaluation and for appropriate weight to be applied to it.
6. Mr Harding amplified his grounds further. Ultimately he said that the judge’s decision was flawed and that there had to be a de novo hearing at the First-tier Tribunal.
7. In his reply Mr Wilding said that although he could not say that the Judge’s decision was a perfect determination, it was one whereby “all the right boxes were ticked” in respect of assessment and in terms of the findings. Insofar as question and reply 38 to the AIR was concerned the judge was entitled to make the decision that she had come to. There was a reason for considering the matter in terms of what had been raised and the grounds were really just an attempt to reargue what was before the judge.

8. Mr Wilding said that the judge's findings at paragraphs 16 and 17 came to a conclusion within a range of findings that could be made. Ultimately the judge explained why whether one or both letters should or should not have the Appellant's names on them. Given the significance of the threat which was supposedly within the correspondence the judge found that the Appellant's evidence was unimpressive. Reasons were provided by the judge and the judge was entitled to come to those decisions.
9. Insofar as the factual matrix was concerned it was submitted that because adverse findings were made then actually it was not necessary to go behind those findings or then to apply the background material because it was not relevant in view of the adverse findings.
10. Insofar as the age dispute matter was concerned, the judge dealt adequately with the report by Dr Birch. The judge considered it and compared it with the social worker's report. It was to be noted that Dr Birch's report was of some vintage and there were strong factors in the judge's assessment in relation to the Appellant being known as an adult in Italy with a date of birth of 1992.
11. It was submitted by Mr Wilding that there was no sufficient basis upon which it could lawfully be said that there was any doubt in respect of age. He said there was a catch-all finding at paragraph 25 which set out the cumulative way in which the Appellant's account could not be believed. The judge was entitled to make the findings that she made.
12. Insofar as the background material which was highlighted to me today, i.e. the assessment of risk to the Appellant for being "westernised", Mr Wilding said that the UNHCR document does not establish a specific risk. The Appellant needed to do more than to flag an individual paragraph. For example, where is it said that this risk will take place, is it countrywide or just in certain areas? The judge's failure to consider the specific point was not a material error of law after having roundly rejected the Appellant's account in terms of his credibility. The judge's decision lawfully disposed of the matter and Mr Wilding submitted that there was no error of law.
13. Mr Harding did not seek to say anything by way of reply.
14. There are two aspects which concern me in relation to the judge's decision. First is paragraph 27 at the second sentence when she said "the test of persecution must be kept at a high and demanding level. There should be strong and credible elements but this is lacking in the Appellant's account." This is not the correct test for a protection claim.
15. The second aspect which concerns me is in relation to the background material which was specifically brought to the judge's attention. Mr Harding who appears before me and appeared at the First-tier Tribunal has provided his contemporaneous notes

of the hearing and indeed I have the bundle of background material and it is quite clear that the judge had before her the background material. Mr Harding's contemporaneous notes are helpful. They show that there can be no doubt whatsoever that the judge was referred to the background material and that she was thereby invited to look beyond the 2012 Country Guidance which was some four years or so in antiquity at that time.

16. There are aspects of this case which are troublesome because there was a detailed age assessment which suggests that it was a **Merton** compliant assessment and I am well aware that there is a lot of case law from both the High Court and the Upper Tribunal in respect of age dispute cases. It appears to me that there was something about the Appellant's case that the judge was troubled by in terms of his age which then seems to have seeped into the general findings which she then made. However what has considerably troubled me though are those two matters that I refer to, i.e. paragraph 27 of the judge's decision where she wrongly set out the test for persecution and the consideration of the background material.
17. In my judgment, it is essential I give this protection case the anxious scrutiny that it requires. With some reluctance and despite Mr Wilding's persuasive submissions, ultimately I conclude that there is a material error of law in the judge's decision. Therefore it would not be safe to leave the judge's decision to stand. In my judgment, the failure to properly set out the standard of proof or to apply it, along with the failure to consider the submissions and the background material as to why the four year old country guidance should not have been followed, shows that there has not been the most anxious scrutiny applied by the judge in this case.
18. I have considered whether there is a way in which I could continue considering this matter and particularly because of the general findings which have been made, but I have concluded on balance ultimately it is difficult to salvage some findings and not others and that in the circumstances there will have to be a complete rehearing. In my judgement the appropriate place for that rehearing will be at the First-tier Tribunal. The previous hearing took place at Taylor House and unless there is a reason why it should not take place at Taylor House then that is where the further hearing will be. The appeal will be a de novo hearing, on all matters. None of the current findings shall stand. There will be further directions from the First-tier Tribunal in due course.

Decision

Appeal allowed and remitted to the First-tier Tribunal for rehearing on all matters.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 8 May 2017

Deputy Upper Tribunal Judge Mahmood

No fee is paid or payable and therefore there can be no fee award.

Signed

Date: 8 May 2017

Deputy Upper Tribunal Judge Mahmood