**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07865/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House UT** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13th September 2017** | **On 03 October 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**MR F.S.**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Nicholson, Counsel
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
I hereby make an anonymity direction on account of these proceeding involving a protection claim.

## DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan, who claims asylum/humanitarian protection saying that he cannot return there on account of a fear of persecution from:

   - the Taliban because although a former member of it, he is suspected of being involved in the death of Taliban members;
   - the Afghan government – which also suspects him of committing various atrocities; and
   - a family blood feud with the MK family, possibly relating to water rights.

2. The Appellant's application for asylum was refused by the Respondent and the Appellant was informed of his liability for removal. He appealed the Respondent's decision refusing his claim and the appeal against the decision came before First-tier Tribunal Judge McMahon on 1st March 2017. The appeal was dismissed in a decision promulgated on 20th March 2017. The judge did not accept the veracity of the Appellant's account and dismissed the appeal on all counts.

3. The Appellant through his representatives applied for permission to appeal to this Tribunal against the decision of the First-tier Tribunal. There is one ground only. It is asserted that the FtT failed to apply the appropriate standard of proof in determining the appeal. It is contended that the FtT determined the appeal using the application of "balance of probabilities" rather than the lower standard of proof appropriate to protection claims.

4. A particular criticism is made of [53] of the decision by reference to the judge using such words as "unlikely" or "most unlikely" when setting out his findings of fact.

5. The relevant part of the grant of permission reads as follows:

   > "The sole ground of the appeal is that the judge applied the wrong burden of proof in deciding the appeal based on (i) his reference at para [53] to balancing the apparent consistencies in the Appellant's account with inconsistencies, and (ii) his reference and various paragraphs to the use of words 'likely' or 'most unlikely' in making his findings of fact. As to (i) this is just arguable because nowhere does the Judge refer to the standard of proof that he is applying and he does refer to balancing the evidence, and, if it is made out there is some merit in (ii)." (sic)

6. The Respondent lodged a Rule 24 response, contending that the Appellant's grounds are not made out because a fair reading of the decision shows:

   - at no point does the FtT decide the appeal on the balance of probability;

- the FtT is simply considering the evidence in the round at [53];
- the findings of "unlikely" are plausibility findings; and
- given the "very significant concerns" set out by the FtT over the core aspects of the claim [56] a "reasonable degree of likelihood" direction would not have altered the outcome of the appeal.

**Error of Law Hearing**

7. Before me Mr Nicholson appeared for the Appellant and Ms Willocks-Briscoe for the Respondent. In keeping to the grounds seeking permission, Mr Nicholson submitted that the judge's findings of fact were tainted by taking a wrong approach to the evidence. His main criticism centred on [53] where, he said, the language used including the words "balance" and "unlikely" lent weight to his challenge that the judge had applied a balance of probability test rather than the correct test set out, for example, in **Karanakaran v SSHD [2000] EWCA Civ 11**. He submitted that should I find that the judge had erred then there was a real possibility that the appeal would succeed, especially when a correct review of the medical report from Harmondsworth detention centre was properly factored into the evidential matrix.

8. Ms Willocks-Briscoe relied upon the Rule 24 response, but also emphasised that the judge when reviewing the hearing had made explicit reference to the relevant standard of proof [12]. It was incorrect therefore to say as suggested in the grounds that there was no mention of this in the decision.

9. She continued by saying that thereafter the judge reviewed extensive evidence concerning the Appellant's claim and clearly found it wanting. The findings made by the judge disbelieving the core claim were well-founded and well-reasoned. The judge's task was to decide what evidence could be accepted and what must be rejected. Ms Willocks-Briscoe referred to [56] wherein the judge had set out his "very significant concerns as to the reliability of important features relating to the core aspects of the claim."

10. Finally, she submitted, if I did consider there to be an error, it was in any event immaterial when regard was given to the evidential findings of fact made by the judge. Alternatively based on those clear and cogent findings, it would also be open to me to say that there was an error in the decision but to find that I could substitute my own decision dismissing the original appeal.

11. Mr Nicholson responded to that last point saying that the original decision was one which could not be corrected and the appropriate course would be to remit the matter for a fresh hearing before a differently constituted FtT.

12. At the end of submissions I reserved my decision which I now give with my reasons.

## Consideration

13. The starting point for my consideration must centre upon an examination of the judge's analysis of the evidence placed before him. In this appeal as in many asylum claims, the credibility or otherwise of the Appellant plays a central role.

14. When considering a protection claim, First-tier Tribunal judges are tasked with looking at evidence in the round, and adopting an approach which takes into account evidence:

    (i) about which they are certain;

    (ii) they think is probably true;

    (iii) willing to attach some credence; and

    (iv) not willing to attach any credence at all.

15. The judge in the instant appeal gave many reasons for disbelieving the Appellant's narrative. There were three elements to the Appellant's core claim as set out above.

16. The first element, which is the historic starting point to the Appellant's claim, related to the blood feud with MK and family. Stemming from this feud was his claim of involvement with the Taliban and the ensuing problems with them and the Afghan authorities.

17. His claim included an assertion that on different occasions in the past he had been stabbed, shot in the hand and shot in the leg by MK's family. As part of the evidence in support of this claim, the Appellant submitted a medical note including a body map drawn up by the doctor who examined him in Harmondsworth detention centre. This showed evidence of a bullet wound scar on the hand, bullet wound scars on the upper and lower leg and a laceration scar of the body trunk.

18. The judge noted the medical report as expressing the doctor's opinion that the Appellant "may have been the victim of torture" [23]. However looking at the evidence in the round the judge decided that he could place little or no reliance on that conclusion. The judge's reason for this was because the account that the Appellant had given to the doctor as to the circumstances in which the injuries had been sustained was inconsistent with other accounts that he had given at different times. I find that the judge was fully entitled to draw that conclusion.

19. The doctor's report dated 21st June 2016 records that the Appellant stated that he had been tortured in Afghanistan, and then proceeds to document descriptions of four separate attacks said to have been carried out by the enemies of his family. The doctor concludes that "on examination he has scars possibly due to the history he has given," this despite the fact that

the history refers to a knife injury to the hand whereas the accompanying body map highlights bullet wound scars in this area.

20. The difficulty for the Appellant is that, as the judge found, there were significant differences in the various accounts given by him as to how the scarring occurred. The judge noted these significant inconsistencies and set them out over several paragraphs in [33] to [37].

21. In [38] the judge noted a further significant conflict in the Appellant's account regarding the timing of when he claimed he was last attacked by the MK family. These significant inconsistencies brought the judge to a conclusion in [50] that the Appellant's overall account was disjointed, partly inconsistent and significantly lacking in detail.

22. A full reading of the decision in my judgment discloses that the judge's analysis of the evidence shows that for good reason the Appellant's account was such that it was open to the judge to attach no credence to it.

23. So far as the other two elements of the Appellant's claim are concerned, they effectively depend upon the evidence of the blood feud being accepted. This is because the Appellant claimed that he joined the Taliban "on account of the blood feud" and that the Afghan government are looking for him because of his membership of the Taliban. The judge sets out in his decision good reasons for discounting the Appellant's claim that he served in the Taliban for several years, not least because the appellant was unable to supply the sort of detail that it would be reasonable to expect of him. It follows therefore that the judge was at liberty to disbelieve those parts of the Appellant's claim as well.

24. In addition the judge gave cogent reasons as to why he could place little reliance on the expert's report, and these reasons are documented in [51].

25. I find force therefore in Ms Willocks-Briscoe's submission that the FtT's findings as expressed by the term "unlikely" amount to plausibility findings only and are not an expression of the standard of proof used. In coming to this finding I acknowledge that the judge might have phrased some aspects of his decision better. I accept also that there is a need for caution when employing plausibility as a tool for assessing evidence given that it can be regarded essentially as a subjective concept, but I am bound to say that in this appeal the inconsistencies in the Appellant's evidence, which are carefully documented by the judge, shake the whole foundation of the Appellant's claim to the extent that the credibility of it falls away.

26. I find therefore on a fair reading of the decision that the judge applied the correct standard of proof and the Appellant can have been left in no doubt as to why his claim failed. I find that the challenge to the FtT's decision amounts to little more than a quarrel with the findings and an attempt to elevate form over substance. For the foregoing reasons therefore this appeal is dismissed.

**Notice of Decision**

The decision of the First-tier Tribunal contains no material error of law requiring it to be set aside. This appeal is therefore dismissed.

**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 his 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 C E Roberts Date 30 September 2017

Deputy Upper Tribunal Judge Roberts