Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11131/2016**

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 28th September 2017	**On 16th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MADADI ZAKER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Wilkins (Counsel)
For the Respondent: Mr G Harrison, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan. He claims to have been born on 13th March 1999 but this is doubted by the Secretary of State and he is believed to have been born on 1st March 1996. The Appellant applied for asylum based on a purported fear of persecution in Afghanistan because of his imputed political opinion namely that he feared the Taliban. The Appellant's application was refused by Notice of Refusal dated 30th September 2016.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Bradshaw sitting at Bradford on 18th May 2017. In a decision and

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reasons promulgated on 26th May 2017 the Appellant's appeal was dismissed on all grounds.

3. The Appellant lodged Grounds of Appeal to the Upper Tribunal on 7th June 2017. On 19th June 2017 First-tier Tribunal Judge Astle granted permission to appeal. Judge Astle noted that the grounds argued that the judge had erred in failing to make any finding on the Appellant's claimed ethnicity and in failing to assess the risk under the Refugee Convention as a result of his ethnicity/membership of a particular social group. Further it was argued with reference to the Appellant's PTSD that the judge had failed to take into account the recent authority of *Paposhvili v Belgium (41738/10)*. Judge Astle considered that it was arguable that the judge had erred in failing to consider the Appellant's ethnicity and risk on return in that regard and permission was therefore granted. So far as the medical aspect of the claim was concerned it was clear that there was a lack of satisfactory evidence but he also considered that that point could be argued in view of the recent authority.

4. On 6th July 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Respondent did not oppose the Appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider the Appellant's claim based on ethnicity and risk on return.

5. It is on that basis that the appeal comes before me. The Appellant appears by his instructed Counsel Ms Wilkins. The Appellant does not personally attend. The Secretary of State appears by her Home Office Presenting Officer Mr Harrison.

Submissions/Discussion

6. Mr Harrison notes that there has been a concession already made by the Secretary of State in the Rule 24 response to the effect that there is a material error of law within the decision of the First-tier Tribunal Judge based on the failure therein to give due and proper consideration to the Appellant's claim based on ethnicity and risk on return. He consequently, on the Secretary of State's behalf, invites me to remit the matter back to the First-tier Tribunal for rehearing.

7. Ms Wilkins reiterates this position pointing that it was arguable that the First-tier Tribunal had erred in law by failing to make any findings on his claimed ethnicity and that there was evidence of this in the form of a letter from the Hazara Association and the fact that the Appellant was speaking Dari a language only spoken in Afghanistan. Further she submits that the First-tier Tribunal had failed to assess the risk under the Refugee Convention as a result of the Appellant's ethnicity by misapplying the decision in *AK (Article 15(c)) Afghanistan [2012] UKUT 00163 (IAC)*. She emphasises that whilst the First-tier Tribunal Judge accepted that the Appellant has PTSD she had failed to make any onward assessment of the risk of Article 3 ill-treatment as a result of his mental health and the impact upon return to Afghanistan.

The Law

8. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

9. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

10. Whilst there is a concession by the Secretary of State in both the Rule 24 and the submissions of Mr Harrison that there are errors of law in the decision of the First-tier Tribunal Judge it is necessary for the Tribunal to give due and proper consideration to these matters. Having done that I am satisfied that there is merit in the submission made. It does appear that the decision is flawed with material errors of law in that there appears to have been a failure by the judge to make any finding on the Appellant's claimed ethnicity and has failed to assess his risk under the Refugee Convention. Further the judge has failed to give due consideration to *Paposhvili v Belgium* a decision which clarifies the law and provides guidance on the circumstances in which an alien suffering from a serious illness can resist removal under Article 3 of the ECHR and gives rise to serious questions as to whether the present UK jurisprudence is in step with the standards set in Strasbourg.

11. For all the above reasons I find that the decision of the First-tier Tribunal Judge is materially flawed and I set aside that decision and give directions for the rehearing of this matter.

Decision and Directions

12. The decision of the First-tier Tribunal Judge contains material errors of law and is set aside. The following directions are to apply:

(1) On there being a finding that there is a material error of law the decision of the First-tier Tribunal Judge is set aside with none of the findings of fact to stand.

(2) The matter is remitted to the First-tier Tribunal sitting at Bradford or Manchester on the first available date 42 days hence with an ELH of 3 hours.

(3) That the remitted hearing is to be before any First-tier Tribunal Judge other than Immigration Judge Bradshaw.

(4) That there be leave to either party to file and serve a bundle of additional subjective and/or objective evidence upon which they seek to rely within 28 days of today's date.

(5) That the Appellant do attend the restored hearing.

(6) That a Dari interpreter do attend the remitted hearing.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris