



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06383/2017

THE IMMIGRATION ACTS

Heard at Field House
On 28th March 2018

Decision & Reasons Promulgated
On 17th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR R. M.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan, Counsel

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on [] 1993. The Appellant claims to have left Afghanistan some five months prior to arriving in the UK and to have arrived in the UK in December 2008 by lorry. The Appellant was thereafter found to be working illegally on 23rd June 2011 and he claimed asylum on 2nd February 2017. The Appellant's claim for asylum was based upon a fear that if returned to Afghanistan he would face mistreatment due to the non-Convention reason that he fears the Taliban due to his father's previous work with the government. The Appellant's application was refused by Notice of Refusal dated 21st June 2017. The

Appellant appealed and the appeal came before Judge of the First-tier Tribunal Geraint Jones QC sitting at Hatton Cross on 2nd August 2017. In a decision and reasons promulgated on 8th August 2017 the Appellant's appeal based upon asylum, the Qualification Directive and human rights grounds was dismissed.

2. Grounds of appeal were lodged to the Upper Tribunal. Those grounds contended:-
 - (i) That the Tribunal had materially erred in law in re-opening subjective credibility of the Appellant where the only basis of rejection of acceptance of the past narrative and future fear was a lack of external corroboration.
 - (ii) That the Tribunal treatment of Dr Giustozzi's evidence was procedurally unfair and/or irrational.
 - (iii) That the Tribunal had acted in a manner that was arguably procedurally biased by forming a view at the hearing in relation to Counsel's conduct in not applying for the hearing to be aborted. The Appellant's Counsel was already preparing the groundwork for an appeal, notwithstanding the assumption that the Tribunal was independent and notwithstanding the rejection at the hearing on preliminary matters could still decide an appeal either way.
3. On 31st October 2017, First-tier Tribunal Judge Shimmin granted permission to appeal. Judge Shimmin noted the Grounds for Appeal and succinctly re-stated them stating that they argued that the judge erred in re-opening subjective credibility of the Appellant where the only basis of rejection of the past narrative and future fear was a lack of external corroboration and that the Tribunal's treatment of Dr Giustozzi's evidence was procedurally unfair and/or irrational in that it was arguable that the expert report was not considered correctly especially in the light of the concessions by the Respondent as to the Appellant's credibility contained in the refusal letter. Finally Judge Shimmin notes that the grounds argued that the Tribunal had acted in a manner that was procedurally biased and that paragraph 79 of the decision indicated such a position by the judge.
4. On 10th January 2018 the specialist appeal team gave a directive response on behalf of the Secretary of State. This is not a Rule 24 response and it is of little relevance for reasons set out below.

The response states:-

"I am unable to provide a response to the claimant's grounds challenging the First-tier Tribunal Judge's decision because the determination is not attached and I am unable to locate it."

5. It is on the above basis that the appeal comes before me to determine initially where there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant is represented by his instructed Counsel Mr Chelvan. Mr Chelvan is familiar with this matter. He appeared before the First-tier Tribunal, he is the author of two skeleton arguments, one before the First-tier and one before myself. He is also the author of the Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Mr Duffy.

6. As a preliminary point bearing in mind the facts and the vulnerability of the Appellant Mr Chelvan applies for an anonymity direction on his behalf. That is not opposed by Mr Duffy and it is granted.

Preliminary Points

7. The challenge herein as a starting point is one of bias. That is constituted by Ground 3 of the Grounds of Appeal particularly in the finding by the First-tier Tribunal Judge due to the perception gleaned from paragraph 79 of the determination in recording the Appellant's Counsel in not applying for the hearing to be aborted and another Tribunal convened, was "seeking to lay the ground for a hearing before a different Tribunal on a different occasion." Mr Duffy makes two concessions. Firstly, he concedes that this ground is made out and that there is consequently a material error of law in the decision of the First-tier Tribunal Judge. He also acknowledges that in the situation where there is an allegation made of bias that it is incumbent upon the Secretary of State to respond to that allegation and that the letter of 10th January fails to address that issue albeit that that is not a criticism of the author of that letter. There had been a change of instructed solicitor.
8. So far as other issues are concerned Mr Chelvan firstly points out to me that the Appellant came to the hearing with the report of Dr Giustozzi. He submits and points out that Dr Giustozzi is well-known and well regarded in the Upper Tribunal and the higher courts and that his second report dated July 2017 includes the most recent evidence available on country conditions before the Tribunal. He points out that there was no evidence filed to rebut Dr Giustozzi's findings on risk of return but that at paragraph 62 the Tribunal had rejected any weight to be attached to Dr Giustozzi's second report as the judge has proceeded on the basis that the Appellant's account is accepted. He submits that the Tribunal had materially erred in rejecting the weight that should have been given to the expert's evidence. He further reminds me that plausibility is a matter for reliable expert evidence and country background evidence and that in these proceedings noting the hurdles that had to be overcome credibility had been rejected at the first hurdle solely based on a lack of external corroboration. He pointed out that both reports from Dr Giustozzi filled the lacuna and therefore this placed the Appellant within the risk category in his home area relying on Dr Giustozzi's expertise on country conditions in Afghanistan and further investigations by one of Dr Giustozzi's researchers who had visited the home area of the Appellant. His submission consequently is that bearing in mind the positive findings and concessions of the Secretary of State the only outstanding issue relates to external corroboration it being accepted by the Secretary of State that no documentary evidence was available. He went on to submit that since the Appellant had been in the UK since 2008 and that there had been nothing produced to undermine Dr Giustozzi's report therefore there had been no basis to challenge the findings. His contention consequently was that despite the concession made by the Secretary of State it was inappropriate for the Tribunal to remit the matter back to the First-tier as that would be a completely wasted exercise and that the correct approach was to remake the decision.

9. In response Mr Duffy accepting the bias point had not been dealt with and that therefore there were material errors of law in the decision of the First-tier Tribunal, took a slightly different view on credibility. The Secretary of State contends that the Appellant's claim is not accepted and that he has not made out his claim and that the mere production of an expert's report does not specifically overcome the credibility issue. Whilst asking me to find that there is a material error of law he is not in a position to concede the matter should be remade and that it is a matter for me as to whether I decide to do so or remit the matter back to the First-tier Tribunal for re-hearing.

The Law

10. 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.
11. 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.

Finding on Error of Law

12. It is clear that there is a material error of law in the decision of the First-tier Tribunal Judge and that this is conceded by the Secretary of State. Unfortunately, due to the choice of words used by the First-tier Tribunal Judge there is a potential for a perception of bias to be considered with regard to the wording used by the judge in paragraph 79 in that the judge may inadvertently have gained the impression that Mr Chelvan was setting him up for an appeal. That consequently constitutes a material error of law. Having made that decision I go on to consider the issue relating to Dr Giustozzi's report and I am satisfied that the manner in which the Tribunal has given due consideration to the evidence of Dr Giustozzi is itself procedurally unfair so far as its approach to expert evidence.

The Remaking of the Decision

13. The issue consequently that I now have to decide upon is whether I can proceed on the submissions made by Mr Duffy and Mr Chelvan to remake the decision or whether it is necessary to remit the matter back for rehearing to the First-tier Tribunal. Mr Chelvan has urged me merely to remake the decision on the basis that all key other issues are accepted so far as the asylum claim is concerned save for the requirement of some form of external corroboration and that this is firstly provided by Dr Giustozzi's report and secondly in any event it is unnecessary to provide external corroboration in a case of this nature.
14. In the event that there is a challenge to the credibility of the Appellant that would require an assessment of the evidence of the general claim and relevant factors would include the internal consistency of the claim, the inherent plausibility of the claim and the consistency of the claim with external factors of the sort said to be found in country guidance. I accept that it is theoretically correct that the claimant need do no more than state his claim but I further consider that a claim still needs to be examined for consistency and inherent plausibility and in nearly every case external information against which the claim could be checked would be available.
15. I accept and agree with the submission made by Mr Chelvan that with the other key evidence being admitted external corroboration is not necessary and that the only gap would be to be found within country background evidence. However, that is actually covered by Dr Giustozzi whose reports fill the lacuna of external corroboration. There is internal consistency. The test of credibility is met and there is corroborative evidence which is not going to be challenged by way of having the matter reheard. In such circumstances I am satisfied that the Appellant meets the criteria of being a refugee and the correct approach is not to remit the matter back to the First-tier Tribunal for rehearing but for me to deal with this matter here and now in a manner in which it is appropriate and proper for a Judge of the Upper Tribunal to do. That I do and for all the above reasons I remake the decision allowing the appeal.

Notice of Decision

The decision is remade allowing the Appellant's appeal on asylum grounds.

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 9th April 2018

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 9th April 2018

Deputy Upper Tribunal Judge D N Harris