



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: PA/07803/2016**

Appeal

THE IMMIGRATION ACTS

**Heard at Field House
On 17th September 2018**

**Decision Promulgated
On 5th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**M S
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood (counsel) instructed by Fisher Jones Fleetwood, solicitors

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. To preserve the anonymity order deemed necessary by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge O'Garro promulgated on 22 June 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 1 January 2000 and is a national of Afghanistan. The appellant arrived in the UK on 29 November 2013 and claimed asylum. As he was a minor, he was granted discretionary leave to remain until 1 July 2017. On 27 June 2016 the Respondent refused the appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge O'Garro ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 31 July 2018 Judge O'Brien gave permission to appeal stating, inter alia

2. The grounds assert that the Judge erred in the following ways. The Judge made findings based on pure speculation. The Judge took no account of evidence which supported the appellant's claim of attempts to forcibly recruit him. The Judge did not take into account the appellant's claim to have been away from home for the period between his brother being killed and his own departure from Afghanistan. The Judge gave inadequate reasons for rejecting the expert evidence. The Judge made inadequate findings about risk on return. For the same reasons, the Judge's conclusions on article 8 were unsafe.

3. It is arguable that the Judge was engaging in speculation when she rejected the suggestion that the appellant's brother would have had with him when he died the arms and ammunition given to him by the Taleban, so that the Taleban have no reason to visit the appellant's house. Whilst the experts report is not particularly impressive, it is not clear why the Judge asserts that the expert's opinions relied solely on the appellant's credibility and so rejected the report simply because the appellant was not credible. No reference is made by the Judge to the evidence of forced recruitment in the appellant's home area. These arguably give rise to material errors of law. All grounds are arguable.

The Hearing

5. (a) For the appellant, Mr Haywood moved the grounds of appeal. He told me that the decision is flawed because of the Judge's treatment of the background materials and an expert report relied on by the appellant. He told me that the Judge had relied on speculation, and had failed to appreciate that the appellant had not lived at home in the year between the loss of his brother and the appellant's flight from Afghanistan. Mr Haywood told me that although the Judge considered the background materials, the Judge' findings (that the appellant came from an area dominated by the Taleban, that the appellant's brother had joined the

Taleban, and that the appellant's brother was killed) had not been properly factored into an analysis of the background information.

(b) Mr Haywood told me that, on the facts as the Judge found them to be, the background materials indicate that there is a real risk to the appellant of forced recruitment to the Taleban. Mr Haywood told me that the Judge's analysis of the background materials at [40] is inadequate. He then took me to [39] and told me that there the Judge made findings based on speculation, not on evidence.

(c) At [46] the Judge deals with an expert report. Mr Haywood told me that the Judge was wrong to disregard the experts report on the basis that she found that the appellant is not a credible witness. He told me that instead of taking a holistic approach to each strand of evidence, the Judge artificially separated consideration of the appellant's credibility and then used her credibility findings to dismiss the expert report.

(d) Mr Haywood told me that the Judge's decision is inadequately reasoned and told me that the Judge's analysis of paragraph 276ADE of the immigration rules is wrong. He told me that the Judge found that there are no obstacles to return because the appellant can return to his family, but failed to consider that the appellant's family lived in an area dominated by the Taleban.

(e) Mr Haywood asked me to set the decision aside and remit this case to the First-tier Tribunal to be determined afresh.

6. (a) For the respondent, Ms Willocks-Briscoe told me that the decision does not contain errors, material or otherwise. She told me that the Judge says at [27] that she has considered all of the evidence in the round, and between [40] and [43] the Judge carefully considers the background materials. She took me to the expert report & told me that much of the expert opinion relies entirely on the appellant's credibility. She told me that, as the Judge finds that the appellant is neither a credible nor a reliable witness, the Judge was correct to find that she could give little weight to the expert report.

(b) Ms Willocks-Briscoe told me that at [47] the Judge recognises that credibility is a crucial consideration, but that she must analyse risk on return also. She told me that the Judge carefully considered the background materials & gave reasons for finding that the appellant is not at risk of forced recruitment by the Taleban. Ms Willocks-Briscoe told me that from [54] the Judge carries out an assessment of internal relocation correctly. She told me that the Judge's article 8 assessment is inadequate and that the Judge correctly considered paragraph 276 ADE of the rules. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. In M (DRC) [2003] UKIAT 00054 the Tribunal said that it was wrong to make adverse findings of credibility first and then dismiss the report. Similarly, in Ex parte Virjon B [2002] EWHC 1469, Forbes J found that an Adjudicator had been wrong to use adverse credibility findings as a basis for rejecting medical evidence without first considering the medical evidence itself. In HE (2004) UKIAT 00321 the Tribunal said that “*where the report is specifically relied on as a factor relevant to credibility, the adjudicator should deal with it as an integral part of the findings on credibility, rather than just as an add on, which does not undermine the conclusions to which he would otherwise come*”.

8. The expert report is reproduced in the appellant’s first bundle. The expert sets out his experience and qualifications before summarising his understanding of the situation in general in Afghanistan. The expert then summarises his instructions. At paragraph 15 he discusses the appellant’s home area and says that it is under Taleban control (a finding which the Judge accepted).

9. The expert then goes on to discuss the Taleban’s methods by reference to background materials, before reaching his conclusions in the final two paragraphs of the report.

10. Between [27] and [45] the Judge considers the appellant’s evidence and the background materials. At [45] the Judge says

In light of these noted inconsistencies, I do not accept that the appellant left Afghanistan for the reasons he has given.

11. It is only after making that finding that, at [46], the Judge turns to the expert report. She gives the report little weight because she finds that the expert prepared his report on the basis that the appellant’s account is credible, and she finds that the appellant is not credible.

12. There are two errors in the way the Judge treated the expert report. The first is that she deals with the appellant’s evidence entirely separately and dismisses the appellant’s account before considering the expert report. The second is that, although the Judge finds that the appellant comes from an area controlled by the Taleban, and that his brother studied at a Madrassa in Pakistan, joined the Taleban and died in an airstrike whilst he was on a mission for the Taleban ([38] and [42] of the decision) the Judge does not set those findings of fact against the contents of the expert report.

13. It is at [39] that the Judge effectively dismisses the appellant’s appeal. It is not clear what evidence the Judge relies on in making her findings at [39]. The declaration that

This aspect of the appellant’s claim makes no sense.....

creates the impression that the findings are not drawn from the evidence but are drawn from supposition.

14. The net effect is that the decision is tainted by material errors of law. I set it aside.

15. I consider whether I can substitute my own decision but find that I can not because a further fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

17. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

18. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge O'Garro.

Decision

17. The decision of the First-tier Tribunal is tainted by material



errors of law.

18. I set aside the Judge's decision promulgated on 22 June 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed
September 2018
Deputy Upper Tribunal Judge Doyle

Date 20