Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02202/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2019	**On 30 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

ISAK [Z]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Collins, Counsel
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

1. Although the grant of permission by First-tier Tribunal Judge Grant-Hutchinson made on 7 June 2019 states that the point with which I shall now deal was a point that the judge was entitled to make, she granted permission to appeal and she did not expressly refuse permission on any of the grounds. In those circumstances I consider that it is open to me to consider the matter. In any event since the matter goes to the core of the procedural fairness of the hearing it is matter on which I consider the Upper Tribunal should re-open of its own motion.

2. It arises in this way and is recorded by the judge in paragraph 13 of his determination which reads:

> "I therefore asked if [the appellant] would be willing to have his mobile telephone examined by the Tribunal. As this issue had only just arisen I gave the appellant permission to confer with his Counsel to consider whether he was prepared to show his phone. After a short adjournment the appellant then handed his phone to myself. I then checked the phone and after the substantial list of contacts I was able to find that there were approximately twelve Albanian contacts with the Albanian international dialling code. In respect of one of those persons the appellant then said that that person lived in England but still used his Albanian phone. In respect of the others he said that these were numbers that he had with him prior to coming to the UK and kept them – for whatever reason – but had had no contact. I then checked the phone to see the list of recent calls and discovered that any recent calls (if there had been any) had been deleted. In other words there was nothing on the telephone logged to indicate who he had been making contact with."

3. I want to emphasise the judge's words '…*if there had been any*'. The judge returns to the subject in the last sentence of paragraph 28 of his determination by finding that the appellant had clearly deleted his recent telephone calls. This was corroborative evidence of his not telling the truth.

4. In doing so, the judge fell into error in that he stepped into the arena and began conducting an investigation of his own about the relevance of the telephone evidence. That is not the function of a judge. He should listen to the evidence and make such findings as he feels able on that evidence but he should not embark on a quest of his own to find more evidence.

5. I do not consider that the consent that was obviously provided by Counsel was sufficient to justify what was otherwise an improper course to adopt. The problem with asking Counsel to consent to this process is that if there had been a refusal by Counsel, there was obviously a risk that the judge would make adverse inferences as the result of the failure to provide consent. That put Counsel in an invidious and unsatisfactory position. It is understandable therefore why he felt it necessary to provide his consent.

6. Secondly, the judge failed to draw the distinction that he had made in the earlier part of his determination in paragraph 13. The fact that there were no recent calls might have been because there had been none or, alternatively, that they had been deleted. In paragraph 28, however, he comes to the conclusion that there had been an attempt by the appellant to delete his recent telephone calls without giving reasons. The judge expressly stated that this supported his view of an adverse credibility finding.

7. As a result, I am satisfied that there was an error of law on the part of the judge. He should not have entered into the arena as he did and carry out an investigation of his own. There are real reasons why this is unfortunate.

8. First, it may be that the evidence which is provided by the mobile telephone might be refuted by additional evidence. Neither side had notice as to how the judge might deal with this further evidence. There may have been an explanation or counter-explanation. It does not seem to me it is appropriate to have this new evidence created, as it were, on the spot. Second, the evidence might have been misconstrued and the wrong inferences drawn.

9. There may be occasions when information obtained on the telephone is offered by an appellant but that is very different from the judge asking, perhaps in effect requiring, the appellant to reveal his telephone contact. In those circumstances I consider that there was a procedural impropriety.

10. I put this suggestion to Mr Tufan, the Senior Presenting Officer who appeared on behalf of the Secretary of State, and he accepted that there appears to have been a procedural irregularity. I set aside the determination for this reason alone. The findings will have to be made afresh.

NOTICE OF DECISION

I set aside the determination of the First-tier Tribunal Judge and direct that the decision is re-made in the First-tier Tribunal.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL

8 July 2019