Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12466/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2019	**On 26 July 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

DA
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr A Maqsood, instructed by Marks & Marks Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. *Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).*

2. This is the appellant's appeal against the decision of First-tier Tribunal Judge Harris promulgated 20.5.19, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 16.10.18, to refuse his protection and human rights claims.

3. The relevant background is that the appellant followed in his father's footsteps by becoming a Shia preacher. As such, he claims to have come to the adverse attention of a prescribed organisation, Saipan e Sihaba. He came to the UK with leave as a student in 2013. He became an overstayer and did not make any protection claim until 2018.

4. Judge Beg accepted that the appellant had been threatened in Pakistan by non-state actors but found that he failed to demonstrate that there would not be a sufficiency of protection for him on return to Pakistan so that his protection claim failed and the appeal was dismissed.

5. The grounds complain that the judge applied the wrong standard of proof, failed to take relevant evidence into account, and failed to consider objective country of origin evidence. First-tier Tribunal Judge Parkes granted permission to appeal on 17.6.19, on the basis that the grounds were arguable.

Error of Law

6. For the reasons summarised below, having heard the submissions of Mr Mansood and Mr Tufan, I find that there was an error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside to be remade in the First-tier Tribunal.

7. I am satisfied that at [69] of the decision the judge made a material misdirection as to the standard of proof. The first part of that paragraph and the judge's reference to "overcome the doubts arising" may be itself problematic but resulted in unchallenged findings in the appellant's favour that:

   (a) As claimed, he is a Shia preacher;

   (b) Two threatening letter were sent;

   (c) Someone contacted the appellant's mother by telephone to threaten the appellant;

   (d) The appellant's mother had an encounter with two men who made threats against the appellant.

8. The judge gave various reasons in the decision for finding that Sipah e Sihaba had not been identified as to the author or source of the threats made against the appellant. However, the second part of the same paragraph [69] is clearly in error with the judge making adverse findings, stating: "there remains in my mind such weight of doubt as to prevent me being satisfied on the balance of probabilities that," in essence, the threats emanated from Sipah e Sihaba, that they were responsible for targeting a fellow Shia preacher, and that they have come to the UK to target him. Obviously, the judge should have applied the lower standard of proof, namely a reasonable likelihood and not the balance of probability. Mr Tufan suggested that it was no more than a slip and pointed to the

correct standard set out at [35] of the decision. However, for the reasons set out below, I am satisfied that the error was material to a relevant issue in the appeal. It follows that that adverse findings cannot stand.

9. Elsewhere in the decision the judge accepted that the appellant had some prominence as a preacher in Pakistan and that even after coming to the UK he continued as a preacher. At [60] the judge found the appellant had provided a plausible account for the provenance of threatening letters, a copy of a complaint made by the appellant's mother to the police about the threats made to her against him, and a newspaper report about threats made to kill him.

10. At [70] of the decision the judge returned to apply the correct standard of proof, accepting as a real likelihood that the makers of the threats against the appellant were motivated by religious reasons but finding that, beyond being non-state actors, the identity of those responsible had not been satisfactorily demonstrated. It was the finding that Sipah e Sahaba had not been identified as the source of the threats that is undermined. However, as I asked the two representatives, the issue is whether, even if the judge found in the appellant's favour on that issue, it had been demonstrated that there was an insufficiency of protection.

11. I find that the judge gave cogent reasons open to the tribunal for concluding that the expert witness was no expert in relation to security matters, only in relation to the appellant's prominence as a Shia preacher. Mr Maqsood argued that if Sipah e Sahaba was the source of the threats then the country background information demonstrated that the state could not provide sufficient protection. Having read the decision carefully, I am persuaded, just, that the finding as to the source of the threats is relevant to the issue of sufficiency of protection. In the circumstances, I find the error as to the standard of proof at [69] of the decision was material to the outcome of the appeal.

Remittal

12. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates key findings of fact and the conclusions from those facts so that there has not been a valid determination of the relevant issues in the appeal.
13. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including

with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the directions below.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

15. The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross;
16. The positive findings of fact in the appellant's favour are preserved. What remains at issue is the source of the threats found to have been made against the appellant and whether there will be a sufficiency of protection on return to Pakistan;
17. The ELH is 3 hours;
18. An interpreter in Urdu will be required;
19. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judges Harris and Parkes;
20. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated