



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: PA/13845/2017

**THE IMMIGRATION ACTS**

Heard at: Field House  
On: 17 January 2019

Decision and Reasons Promulgated  
On: 06 February 2019

Before

Deputy Upper Tribunal Judge Mailer

Between

MR N. F.  
ANONYMITY DIRECTION MADE

**Appellant**

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation**

For the Appellant: Mr J Walsh, counsel, instructed by Davjunnel Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them 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.

1. The appellant is a national of Afghanistan, born on 1 January 1991. He appeals with permission against the decision of First-tier Tribunal Judge R Sullivan who, in a decision promulgated on 9 November 2018 dismissed his appeal against the decision of the respondent dated 13 December 2017 to refuse his protection claim.

2. She stated at [33] that having reviewed all of the documents in the context of the evidence as a whole, she was not satisfied: (a) that the police report provides reliable evidence that threats were made to the appellant in Afghanistan; (b) that the threatening letter was genuinely written by a Taliban representative to the appellant; and (c) and that the Facebook posts are reliable evidence of a threat being made to him.
3. She had earlier had regard to a report by Mr J H Zadeh regarding the asserted original threat letter by the Taliban. His evidence was produced from pages 27-39 of the appellant's bundle. She found at [32] that having considered the threatening letter in the context of the evidence as a whole, including Mr Zadeh's report, she was satisfied that it has the appearance of a Taliban threat letter. However, she was not satisfied that the evidence is sufficient to say that it is in fact a genuine Taliban threat letter.
4. In granting permission to appeal, First-tier Tribunal Judge Davidge noted that the grounds complained that the appellant had provided to the respondent a hospital receipt in respect of his brother's treatment in Kabul and a letter or form provided to him by Border Force Control on entry to the UK, and that had those documents been before the First-tier Tribunal Judge, a different outcome in respect of credibility may have ensued. It is arguable that they should have been before the First-tier Tribunal. She directed that the respondent must ensure that they are available for the error of law hearing.
5. Judge Davidge found that the remainder of the grounds appeared to have little merit, including the challenge to Judge Sullivan's criticisms of the expert on the basis that it was for the Tribunal to adjourn and insist that the expert be called to see if he could answer the difficulties identified in the report. She stated that this ignored the fact that it was for the appellant to decide what witnesses to bring forward and the Judge is bound to make a decision on the evidence as it is presented. Nor did the criticisms of the findings concerning the appellant's chronology appear to overcome the essential difficulty in the timeline identified.
6. Mr Walsh, who did not represent the appellant before the First-tier Tribunal, adopted the grounds of appeal settled by other counsel. He submitted that the Judge made various factual errors in relation to the evidence before her.
7. In particular, she stated in a lengthy paragraph [21] that she considered the application of s.8 of the 2004 Act to the case. She concluded that there is behaviour to which that section applies, namely the appellant's failure to claim asylum on entry to the UK on 19 March 2016. She noted that his explanation was that he did claim asylum there but was sent away by the immigration officer when he was approached at the airport. The claim was not supported by documentary or witness evidence.
8. Further, she stated that in his oral evidence, he described dealing with at least two different immigration officials at the airport. He was questioned about his problems in Afghanistan. He said they noted that his visa was still valid. He was asked if he had somewhere to live and when he said that he did he was told to go on his way

and to claim asylum in Croydon. He said that he waited a further month because he had never claimed asylum before and he did not know the regulations and was traumatised and not mentally fit to claim asylum.

9. Judge Sullivan considered this explanation in the context of the evidence as a whole but did not find it credible. She stated at [21] that she knew from her work in this jurisdiction that formal records are made of those interviewed by immigration officials at the airport and no such record has been filed in evidence.
10. Nor did she find that it was credible that two different officials would have chosen to ignore a claim for asylum when such importance is attached to an applicant claiming at the first opportunity. It is not credible that an intelligent, well educated man like the appellant, who had lived in the UK for some three and a half years, who had studied for a BA and a Masters degree in Business Studies and who knew enough to claim asylum at the point of entry, would not have appreciated the importance of making a timely claim in Croydon.
11. As part of her section 8 assessment she also stated that the appellant provided a medical report dated 1 September 2016. The doctor said that the appellant was too unwell to claim asylum between 19 and 24 March 2016 but as he did not go to the doctor's until 24 March 2016 it appeared to her that the report must be based on the appellant's own account and is thus not independent confirmation of the position [21].
12. She thus found that the appellant's delay in claiming asylum is to some extent damaging to his credibility. That is one factor she stated she must take into account when deciding the appeal.
13. Mr Walsh contended that in fact the appellant had submitted the "Border Force Letter" from Heathrow Airport, namely an IS 81 dated 19 March 2016 showing that he submitted to inquiry at the airport for the purpose of claiming asylum. He would not have this document if he simply entered the UK on his valid student visa.
14. The appellant was asked at his screening interview whether he has any documents or other evidence relevant to his claim. He stated in reply to that question at paragraph 6.2 of the screening interview, page A8 of the respondent's bundle, that he was submitting documents relevant to his claim that day, namely, the threat letter he received with a translation; his application to the Police Commissioner in Afghanistan with a translation; a report from the hospital with translation and a threat from Facebook from the Taliban. It is recorded at 6.2 that the 'above documents placed on file'. Mr Walsh submitted that the respondent should have brought this to the attention of the First-tier Tribunal.
15. The appellant produced the Home Office form IS 81. The purpose of the form is to inform him that the Border Force Officer intends to make further inquiries, or there are other formalities to be completed before he can pass through immigration control.

16. The appellant's full name is recorded in the document. He was notified that he is liable to be examined/further examined by the Immigration Officer or another Border Force immigration officer. He was informed that he is liable to be detained under Paragraph 16(1)(A) of Schedule 2 of the Immigration Act 1971, pending completion of his examination and pending a decision whether to cancel his leave to enter. Further, it is noted that the officer also retained his passport, identity card or travel document.
17. The document is signed by the Immigration Officer on 18 March 2016. It is noted that the "passenger" arrived on 18 March 2016 at 21:30 from Istanbul. He is an Afghan national. His date of birth is 1 January 1991. The form was issued at 21:31. The appellant's Turkish Airlines boarding pass relating to that date was also produced.
18. Mr Walsh submitted that the respondent should have provided the Tribunal with the hospital record which was on file. It was recorded in the screening interview that the appellant in fact produced a hospital report with translation. The letter was not produced.
19. Mr Walsh referred to Judge Sullivan's concern that there was no explanation given for the delay from 19 March 2016 until 20 April 2016 in claiming asylum. He submitted that the appellant had in fact telephoned the Home Office at Croydon on 24 March 2016 and was given a reference number – namely, no: 24904 - for an appointment with Croydon on 20 April 2016. The respondent accordingly must have a record of that and it could not therefore have been properly maintained that there was a delay of a month in claiming asylum. The respondent was requested in paragraph 2(b) of the grounds of appeal seeking permission to appeal, to supply the Tribunal '...with evidence of the appellant's telephone claim on 24 March 2016'.
20. Mr Walsh accordingly submitted that the Judge did not properly appraise the evidence of delay. There was evidence that he approached the officer at the airport. The IS 81 tends to support that assertion. It is thus not correct to state that there was no evidence of the explanation for the delay apart from the appellant's own assertion. The respondent was in possession of a document evidencing his claim.
21. Further, the Judge noted at [21] that there was no hospital record of his brother's stay in hospital following the family being attacked when travelling in a car from Pul e Kumari in Kabul [36b]. In fact, at paragraph 6.2 of the screening interview it is recorded that a report from the hospital with translation was submitted by the appellant and is on file. The respondent should have provided the Tribunal with that hospital record which was on file. Mr Walsh referred to paragraph 16(1A) of Schedule 2, Part 1, of the Immigration Act 1971, which provides that a person whose leave to enter has been suspended under paragraph 2A may be detained under the authority of an immigration officer pending completion of his examination under that paragraph and a decision on whether to cancel his leave to enter.

22. Mr Walsh accordingly submitted that a substantial part of the reasoning at [21] was based on incorrect information. The documents should have been placed before the Judge. This amounts to procedural unfairness in the circumstances.
23. Further, Mr Walsh submitted that the appellant claimed that he telephoned the respondent five days later and got an appointment for asylum for 20 April 2016. In that respect, he referred to the appellant's own witness statement which was before the Tribunal at A11, paragraph 12. The appellant stated that the respondent failed to acknowledge that on his return to the UK on 19 March 2016 he did ask for asylum at Heathrow Airport but was advised by the officer that as he still had a visa, he could live with his aunt and go to the Home Office in Croydon and claim asylum at any time that he wanted.
24. He stated that he did not claim asylum straight after arriving in the UK as he was ill and suffering mentally because of the events that had taken place in Afghanistan. He saw his GP and told him about his inability to sleep and his mental problems. As a result of his mental state, he claimed asylum on the date that he did.
25. Mr Walsh referred to IS 76 Additional Grounds, produced at the hearing. He also referred to page 87 of the bundle containing a letter dated 1 September 2016 from Dr Lloyd, the appellant's GP which stated that the appellant consulted them on 24 March 2016 and was diagnosed with Post Traumatic Stress Disorder. This was confirmed and treated by their local psychologist. Dr Lloyd concluded the letter and stated that '...This letter is to confirm his illness. He was too unwell between 19<sup>th</sup> and 24<sup>th</sup> March 2016 to apply for asylum'.
26. Mr Walsh also referred to the additional grounds that were produced to the Tribunal, in which the appellant stated that five days after his arrival in the UK, namely on 24 March 2016, he received a threat from the Taliban via Facebook at 5.49am. He then applied to Croydon on that day, after he had been to see his GP. He went to his GP as he had been unable to sleep and was suffering from headaches and pain all over his body.
27. Mr Walsh referred to Ground 3 of the grounds of appeal. He submitted that there was no proper basis on which to find that Mr Zadeh was not an expert on the authentication of documents said to emanate from the police and Taliban. The Judge did not give him an opportunity to respond to that criticism.
28. He submitted that the comparative samples produced by by Mr Zadeh were relevant. The Judge referred to this at [30]. This had been dealt with in paragraph 28, at page 33 of the appellant's bundle. Mr Zadeh stated that he had two sets of comparative samples, namely, hard copy samples and electronic samples. He also stated that he has continually handled Afghani documents since 1994. He has had sight of more than 10,000 original Afghani documents. The document, following a full examination of the original threat letter produced at page 33 matched his comparative samples. In the translation at E2, it is stated that it has been stamped by the Islamic Emirate of Afghanistan and signed by the head of Baghlan's Central Intelligence. The name of the signatory is given.

29. At [31] of the decision, Judge Sullivan stated that according to Mr Zadeh, there is no name beside the signature. She contrasted that with the translation at E1 which clearly shows a name under the word "signed". She cannot explain that discrepancy. Mr Walsh submitted however that there was in fact no discrepancy. He submitted that in fact, the signature is contained in the original at E1. That finding was 'also procedurally unfair'.
30. Mr Walsh further submitted that there was no significant discrepancy in the appellant's chronology as found by the Judge at [36(c)].
31. He referred to the appellant's asylum interview - Q40. The appellant was asked what he did after receiving the Taliban letter. He said in reply that they were all actually scared and all the family was disappointed and scared. "... I had just given information and help to young people, it had only been one or two days since I came and I hadn't been anywhere." The appellant answered the questions in English. The Judge took from that that the letter was one or two days after he returned on 19 February.
32. Mr Walsh noted that the appellant was not satisfied with the translation in the interview and had sent in his amended transcript. These were produced in the appellant's bundle, together with a translation certificate from pages 19-24. The translator stated that the appellant said "we were actually scared and all the family, my father, my mum, my brothers and sisters were all actually very disappointed and scared, because I was there to just give information and help people (young people) and actually, just like one or two days I was home. I didn't go anywhere."
33. Mr Walsh submitted that it is easy to understand why the Judge might have made this mistake. He noted that after his asylum interview, the appellant went over the tapes and submitted his corrections, which were set out at C1 of the respondent's bundle. These were the appellant's own corrections; there is no correction to question 40 at C7. However, the Judge did not have regard to the professional translation which was subsequently produced at A20.
34. On behalf of the respondent, Mr Avery submitted that the error regarding s.8 of the 2004 Act is not material. This was a peripheral issue. The Judge stated that this was one factor that must be taken into account.
35. Nor is her statement at [36(b)] that there is no copy of any hospital record of the appellant's brother's stay in hospital. The Judge has given reasons in the previous paragraphs regarding that issue and in particular at [35]. She found several aspects of the appellant's account unlikely.
36. As to the grounds concerning the expert report produced by Mr Zadeh, they amount to a disagreement with the Judge's findings. She has looked at the report in detail. She was not happy with the report in certain respects.
37. Her interpretation at [31] was open to her. At E1, there is no name besides the signature itself. At E2, there is a name shown under the word "signed." In any event, there were sound reasons for not accepting the expert's report.

38. Finally, paragraph [36(c)], which dealt with the answer to question 40 of the asylum interview, amounts to a question of interpretation. It might reasonably be interpreted both ways including the interpretation the Judge placed on it. The transcript was in English. This too did not amount to a material error of law.
39. In summary, he submitted that the Judge has clearly set out why the appellant would not be at risk.
40. In reply, Mr Walsh contended with regard to question 40, that the interpretation may be open to the Judge had she had proper regard to the transcripts produced. However, she did not have regard to it.
41. With regard to the expert report, her findings relating to his expertise are irrational.
42. As to s.8, the respondent in the refusal letter at paragraph 33 did not contend that the appellant failed to claim asylum in time. The issue raised by the respondent was that he did not give a reasonable explanation as to why he did not claim asylum at the port of entry. It was the Judge who "ran with that" at [21]. It is a substantial paragraph. It cannot simply be ignored.
43. He noted that the documents which were not produced at the hearing have still not been produced. The respondent still has documents about the appellant's brother's medical report.

#### Assessment

44. First-tier Tribunal Judge Sullivan has undertaken a detailed assessment. Mr Avery has submitted that the errors which have been identified were not material. She stated at the outset at [19] that she has not considered any one aspect of this matter in priority to, or isolation from, another.
45. Mr Walsh has however submitted that she has in fact given a detailed consideration regarding the application of s.8 of the 2004 Act at [21]. Moreover, the issue of delay in this case was not ever raised by the respondent.
46. The Judge found that the appellant had not provided any documentary evidence supporting his claim that he tried to claim asylum at the airport but was sent away by the Immigration Officer [21]. She stated that from her work in this jurisdiction, formal records are made by immigration officers of those who are interviewed at the airport. No such record had been filed in evidence. She concluded that it was not credible that two different officials would have chosen to ignore a claim for asylum when such importance is attached to an applicant claiming at the first opportunity.
47. However, as already noted, the Home Office form IS 81 was not produced at the hearing. It has now been produced. I have set out its terms in some detail. The appellant was informed that he is liable to be examined by an immigration officer; he is liable to be detained pending completion of his examination and pending a decision as to whether to cancel his existing leave to enter, the immigration officer has also retained his passport. It is noted that the "passenger" arrived on the 18

March 2016 at 21.30. The form is stated to have been issued at 21.31. It is accordingly evident that the appellant was not interviewed.

48. The Judge also noted at [21] that the appellant's delay in claiming asylum is to some extent damaging to his credibility. She stated that the appellant stated that he waited a further month because he had never claimed asylum before.
49. It was not evident that the appellant had delayed in claiming asylum. There was clearly not a delay for a month before he claimed asylum. A date was arranged shortly after his arrival to make a claim for asylum. The appellant telephoned the Home Office at Croydon on 24 March 2016, several days after he arrived, and was given a reference for an appointment in Croydon on 20 April 2016. He produced the letter from his GP dated 1 September 2016. He claimed in his evidence that he in fact went to see his GP and told him he could not sleep and had mental problems. It was as a result of his mental state, as noted by his GP, that he claimed asylum on the date that he did.
50. It is also evident that the appellant submitted documentation at the time of his screening interview. The documents that he produced are identified at paragraph 6.2. This included the Border Force letter from Heathrow Airport, the threat letter and translation, a report from the hospital with the translation, and a threat from Facebook from the Taliban.
51. The report relating to the appellant's brother was not however produced at the hearing.
52. The appellant produced the "one stop notice" issued to him under s.120 of the 2002 Act on 20 April 2016. He also produced a five page response in which he confirmed that he produced the hospital report with the translation at his screening interview.
53. He also produced a translation from Afmart Itab of his interview record. His response to question 40 of the interview is set out at page 20 of the bundle. He also produced at C1 of the respondent's bundle corrections of the interview dated 20 September 2016 which he stated he prepared on his own. He did not however amend his answer in those set of corrections.
54. The Judge stated at [36(c)] that no correction was made by the person who transcribed the interview for the appellant at Annex C7. However, that annex contains corrections of the interview that he said he has prepared.
55. Nor did the Judge have regard to the appellant's evidence with regard to question 40 of his interview. He stated in paragraph 5 of his witness statement at pages 4-5 of the bundle, that he was asked what he did after receiving the letter. He said it was "just like one or two days I was home, I did not go anywhere." He noted that his response had been confirmed by the 'transcriptionist in the transcript'.
56. I have considered Mr Avery's submissions that the errors are not material in the circumstances.
57. However, it is evident that he was not interviewed at the airport on arrival. He was been provided with a form by the Border Force Control Immigration Officers in the



UK. He was told that he should claim asylum at Croydon. Unfortunately, that document was not produced to the Judge.

58. Further, he had produced a hospital record at his screening interview, regarding his brother's treatment in Kabul. That document was not produced. It has still not been produced. There has been no explanation as to why the documents which were placed in the file when he was interviewed – 6.2 – were not been produced before the First-tier Tribunal.
59. Although Mr Avery submitted that there was enough evidence before the Judge to substantiate her ultimate conclusion that the appellant had not made out his asylum claim, I cannot conclude that had all the necessary documents been produced and made available to the Judge, and if there had not been a misapprehension about some of the facts, including the translation regarding the asylum interview, that she would inevitably have come to the same conclusion as to the appellant's credibility.
60. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. It was agreed that in those circumstances, a fresh decision would have to be made by another Judge.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside. The appeal is remitted to the First-tier Tribunal (Hatton Cross) for a fresh decision to be made by another Judge.

Anonymity direction continued.

Signed

Date 23 January 2019

Deputy Upper Tribunal Judge Mailer