Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00222/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 10 January 2020	**On 12 February 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Masih of Counsel instructed by Clyde Solicitors
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Andrew promulgated on 8 August 2019 in which the Appellant's appeal was refused on protection and human rights grounds.

2. The Appellant is a citizen of Pakistan born on 8 March 1981. He left Pakistan on 6 November 2015 arriving in the UK on 26 January 2016. On 28 January 2016 he requested an appointment with the Respondent's asylum unit, and on 18 February 2016 the Respondent formally recorded him as having made an application for asylum.

3. His application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 15 December 2017.

4. The Appellant appealed to the IAC.

5. The appeal was dismissed for reasons set out in the Decision of First-tier Tribunal Judge Aziz promulgated on 22 May 2018.

6. The Appellant made an application for permission to appeal to the Upper Tribunal which was granted. In due course his case was considered by Deputy Upper Tribunal Judge Chapman on 1 May 2019. Judge Chapman found that there was a material error of law in the decision of Judge Aziz; the appeal was remitted to the First-tier Tribunal. Judge Chapman indicated that certain findings of Judge Aziz should be preserved. Those findings were limited in nature and essentially related to the Appellant's background and his qualification as a pharmacist: (now see paragraph 18 of the Decision of Judge Andrew). These findings were of some relevance to the protection claim: the Appellant had claimed that as a pharmacy technician he had been taken by members of the Taliban to assist in the treatment of injured Taliban fighters; whether this was on the basis of a mistaken belief that he was a doctor, or whether it was considered that his skills as a pharmacist would be of value, is less clear.

7. The Appellant had provided supporting documents in respect of his professional qualifications at the time of his application. In the first instance these were rejected by the Secretary of State. The findings of Judge Aziz in substance reversed that aspect of the Respondent's decision; nonetheless Judge Aziz concluded that the Appellant's account was otherwise such that he was not entitled to protection.

8. Pursuant to the remittal to the First-tier Tribunal - with the limited preserved findings of fact – the appeal came before First-tier Tribunal Judge Andrew.

9. Judge Andrew dismissed the Appellant's appeal for reasons set out in her 'Decision and Reasons' promulgated on 8 August 2019.

10. The Appellant again applied for permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by First-tier Tribunal Judge O'Keeffe on 11 September 2019, but was subsequently granted by Upper Tribunal Judge Smith on 2 October 2019.

11. The background to the Appellant's case is set out in succinct but clear detail in the decision of Judge Chapman, which is a matter of record - (see in particular paragraphs 1-4). In the circumstances I do not repeat Judge Chapman's rehearsal of the Appellant's claim. However, for present purposes it is appropriate to note two matters in particular.

    (i) As alluded to above, the Appellant claims he was taken by the Taliban to treat injured fighters He claims that on a further occasion he was being transported by the Taliban when there was a firefight with security forces. It is his case that he was being taken as a pillion passenger on a motorbike, whilst other Taliban members were travelling by car. It was the car and its passengers that became engaged in the shooting incident; the motorbike eluded the incident, and so the Appellant did not become directly involved. However, it is the Appellant's case that the security services were able to connect him to the incident because his wallet was found in the car. He claims that the security services came looking for him accordingly.

    (ii) Further to this, the Appellant also claims that he is the subject of an arrest warrant. He has produced what he says is a copy of the arrest warrant, and he has also provided evidence which he says was secured pursuant to an attempt to verify the authenticity of the arrest warrant through the services of an advocate based in Pakistan.

12. The Appellant's consolidated bundle before Judge Andrew included what was said to be supporting evidence from the advocate in Pakistan; such evidence was in two distinct sections of the bundle. The consolidated bundle comprises in part the bundle that was before Judge Aziz, and in part further materials filed and served for the second First-tier Tribunal hearing before Judge Andrew. The relevant materials include: a letter dated 22 January 2018 from the Pakistan advocate, which was also before Judge Aziz (consolidated bundle, tab 2, page 42); documents seeking to bolster the evidence of the advocate including documents said to relate to his standing, and by way of verification that such a person was a practising lawyer in Pakistan (tab 1, pages 5-9).

13. Judge Andrew set out her consideration of this aspect of the Appellant's case from paragraph 40 of the Decision: the nature of the materials filed by the Appellant were identified (paragraph 40); the Judge expressed surprise – "*I am surprised*" - at the fact that the Respondent had not attempted to verify the arrest warrant (paragraph 41); and the Judge expressed at the format of the arrest warrant - "*I am surprised that the claimed arrest warrant has been written on what appears to be a sheet of blank paper and there is no heading as such to confirm that it comes from the PA's office. It is apparently signed and with an official seal but as I*

have not seen the original of the document I am unable to comment on this." (paragraph 42).

14. The Judge then turned her attention to the evidence relied upon by the Appellant by way of verification, purportedly sourced from the advocate in Pakistan (paragraph 43). Paragraphs 44-46 are in these terms:

> "*44. I then turn to the document at page 5 of the Appellant's Bundle which purports to be a Certificate for permission to appear completed by the Bar Council. I do have doubts as to the authenticity of this document. I note that it is misspelt i.e. 'The NWFP Bar Councilhere by certifies…'. I further note that the alternatives have not been deleted, as I would have expected them to be had the Certificate been a genuine one.*
>
> *45. The ID Card gives [the advocate]'s place of practice as Charsadda whereas the letter at page 42 of Tab B indicates that his address is Peshawar. Further, bearing in mind the Appellant's evidence that the ID card was received on 28 June 2019 I note that the ID card is only valid until 25 February 2018 and was out of date by the time it was received.*
>
> *46. The number on the claimed Licence to Practice at page 5 Tab A of the Appellant's Bundle is [**]71 yet throughout [the advocate's] number is given as BC-10-[**}98.*"

(I have included the asterisks above in keeping with the anonymity direction herein.)

15. The reference at paragraph 44 to the 'alternatives' not having been deleted is in respect of a *pro forma* document which has the alternatives 'Mr/Miss/Mrs' and 'Son/Daughter/Wife of Mr', which had not been 'struck through' to indicate applicability.

16. The Judge went on to observe that these matters "*taken in the round with the other evidence that I have heard leads me to find that no weight can be placed on the claimed arrest warrant*", which the Judge considered "*adds to my finding that the Appellant is not credible in his claim*" (paragraph 47).

17. The Judge also stated:

> "*I would also add that despite the Appellant being in contact with his brother I have nothing to confirm the Appellant's assertions either*

about what happened to him in Pakistan or the claimed arrest warrant" (paragraph 48).

18. In my judgement the reference to there being '*nothing* to confirm… the claimed arrest warrant' can only sensibly be reads as indicating that the Judge did not merely marginalise the weight to be attached to the evidence from the advocate, but proceeded on the premise that such evidence could be accorded no weight whatsoever – inherently implicit is that the Judge rejected such evidence outright.

19. The difficulty that such reasoning encounters is that it is apparent that neither the Respondent nor the Judge raised any particular issues or concerns with the Appellant or his representative directly in respect of this supporting documentation. The Grounds of Appeal to the Upper Tribunal not only make complaint about unfairness, but also seek to address in some detail each of the concerns expressed by the Judge at paragraphs 44-46. It is submitted that the failure to strike-out alternatives on the *pro forma* certificate was essentially trivial and not sufficiently substantial to undermine the validity of that certificate; there were two addresses because the advocate has more than one office from which he practices; the numbers on the certificate and the Bar Council number were different because they related to different things. Such matters could have been advanced before the First-tier Tribunal had the issues been raised.

20. I note that the Appellant has now filed further supporting evidence from Pakistan in an attempt to address these matters in the event that the decision in the appeal requires to be remade. I acknowledge that at this stage such 'new' evidence is to be disregarded in considering 'error of law'. However, they are an indication that the Appellant would likely have sought to put himself in a position to address the concerns that informed a significant aspect of the Judge's adverse findings had they been raised directly, and - if there is error on the part of the First-tier Tribunal - are otherwise relevant to a consideration of how the exercise of discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 should be exercised.

21. I am persuaded that there was a material error of unfairness in that significant supporting documentary evidence was rejected without the issues of concern having been raised during the course of the proceedings. Notwithstanding that other aspects of the Decision of the First-tier Tribunal appear to be cogently and sustainably reasoned (subject to the caveat below), I conclude that this error is of such significance that the decision of the First-tier Tribunal cannot stand.

22. Although for the main part I consider the First-tier Tribunal decision cogently reasoned, there is one further significant aspect of the analysis which I find not to have been adequately or sustainably reasoned. This is in respect of the Judge's consideration of the circumstances surrounding the Appellant being connected to the shooting incident by reason of his wallet having been found in the vehicle in which Taliban members had been travelling.

23. The Judge's consideration of this particular incident starts at paragraph 29 of the Decision where the Judge states:

> "*The Army knew he was on the back of the bike because the leader of the Taliban had taken the Appellant's wallet which had his ID cards in it and said that when they reached his home it would be returned. The Appellant claims that it was found in the ambushed vehicle.*"

The Judge essentially rejected this aspect of the Appellant's testimony for the reasons set out at paragraphs 30-32.

24. At paragraph 31 the Judge says this:

> "*I am further concerned as to the manner in which the Appellant claims he was identified. He was not in the car which was involved in the shooting of the Army soldiers. He was on a motorcycle that was not involved and managed to get away. I find it incredible that given he was on a different vehicle the Appellant's wallet would be placed in the car with the other members of the Taliban*".

25. It is to be noted that the Appellant explained exactly the circumstances as to why he claimed his wallet had been in the car. It had not been in his possession when he was on the motorbike because it had been taken by one of the members of the Taliban who then subsequently got into the vehicle. To that extent it is entirely clear on the face of the Appellant's account - whether it be rejected or otherwise - the manner in which the wallet would have been in the vehicle rather than with the Appellant on the motorcycle.

26. In this context the Judge states that she can find "*no credible reason why the Taliban would wish to take the Appellant's wallet*" (paragraph 32). It seems to me that that is to look at the situation from the detachment of a hearing room without due consideration of what might happen on the ground in Pakistan, how the Taliban might operate, and the significance to an individual of being deprived of a wallet containing significant matters – including ID documents – which might make render its possession a coercive tool.

27. The Judge goes on to consider matters in the alternative:

> "*Even if I am wrong about this there is nothing to show that the Appellant's wallet in a car would lead to the soldiers automatically assuming he had been involved in any shoot out. The wallet could have been there for any number of reasons – it had been stolen, it had been misplaced, for example. I am satisfied that this part of the Appellant's claim has been manufactured merely to explain why the army should suspect the Appellant*" (paragraph 32).

28. It may well be that there are cogent 'innocent' reasons why a wallet would be in a vehicle used by the Taliban. But missing from the Judge's analysis is any contemplation of how the security forces would react to such a discovery. The Judge's reasoning is only sustainable if it might be thought that there is no reasonable likelihood of any outcome other than the security forces assuming that the wallet was in the car 'innocently'. Put another way, the Judge's reasoning is only sustainable if it is not reasonably likely that the security services on finding such a wallet at the scene of an incident would seek to investigate the owner of the wallet - even if then an innocent explanation might be offered and accepted. The Judge's reasoning is essentially premised on the security forces assuming an innocent reason and taking no action by way of investigation. I find that the Judge's reasoning lacks cogency and is ultimately unsustainable. The Judge's use of the phrase "*...lead to the soldiers automatically assuming...*" does not allow of a 'reasonable likelihood' that the soldiers would suspect the Appellant, or at least seek to investigate him.

29. For the reasons given, the Decision of the First-tier Tribunal requires to be set aside. Although this case has already been heard twice by the First-tier Tribunal, it seems to me that on both occasions the Appellant has not had a full and fair consideration of his case: in such circumstances, with some hesitation, I conclude that the case must go back yet again to the First-tier Tribunal, to be heard by any Judge other than First-tier Tribunal Judge Aziz or First-tier Tribunal Judge Andrew. The findings of fact previously preserved should again be preserved: Judge Andrew did not go behind those findings recognising the direction of the Upper Tribunal, and there is nothing that emerged during the course of proceedings before Judge Andrew or subsequently which would point in a different direction. Accordingly, the findings of fact preserved from the decision of First-tier Tribunal Judge Aziz - as set out at paragraph 18 of the decision of First-tier Tribunal Judge Andrew - are again to be preserved. The decision in the appeal is otherwise to be remade with all other issues at large.

Notice of Decision

30. The decision of the First-tier Tribunal contained material error of law and is set aside.

31. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Aziz or First-tier Tribunal Judge Andrew, with preserved findings of fact as identified above and otherwise all other issues at large.

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 his 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.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **9 February 2020**

Deputy Upper Tribunal Judge I A Lewis