Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06567/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House by Skype for Business	**Decision & Reasons Promulgated**
On 6 October 2020	**On 29 October 2020**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr K Smyth, Kesar & Co Solicitors (Bromley)

DECISION AND REASONS

A. INTRODUCTION

1. This is another case that illustrates what can go wrong when a judge's decision records the opposite result to that which she plainly reached, in the light of the reasoning set out in the body of that decision.

2. Having heard the protection and human rights appeal of the appellant, a citizen of Afghanistan born on 1 January 2001, Judge Herlihy promulgated a decision in January 2019, dismissing the appellant's appeal on asylum and humanitarian protection grounds. Judge Herlihy did not find the appellant's account of his experiences in Afghanistan to be credible. She concluded that he would not face a real risk of serious harm, if returned to Afghanistan. He would not be at real risk of violation of Articles 2 and 3 of the ECHR. So far as Article 8 was concerned, Judge Herlihy saw "no reason why his private life cannot continue in all its essential elements in Afghanistan". At paragraph 33 of her decision, she concluded that removing the appellant would be "proportionate under Article 8(2) of the ECHR.

3. In her "Summary of Decisions", Judge Herlihy wrote as follows:-

> "34. I dismiss the appeal on asylum grounds.
>
> 35. I dismiss the appeal on humanitarian protection grounds.
>
> 36. I allow the appeal on human rights grounds."

4. Almost immediately after promulgating her decision, it appears that Judge Herlihy realised that she had written "allow" in paragraph 36, when she meant to write "dismiss". Another decision was, accordingly, quickly promulgated, identical in all respects save for that change.

5. The first of Judge Herlihy's decisions appears to have reached the Secretary of State some time before the second one. The Secretary of State filed an application for permission to appeal against the decision allowing the appeal on human rights grounds. Upon receipt of the second determination, however, the Secretary of State applied on 13 February 2019 to withdraw her application for permission in respect of the first of the decisions.

B. THE REVIEW AND SET ASIDE DECISIONS OF RESIDENT JUDGE APPLEYARD

6. The matter came before Resident Judge Appleyard on 26 February 2019. He refused to allow the Secretary of State to withdraw her application for permission to appeal in respect of the first decision. Relying on Katsonga v Secretary of State for the Home Department ("Slip Rule": FtT's general powers: Zimbabwe) [2016] UKUT 228 (IAC), Resident Judge Appleyard considered that Judge Herlihy was *functus officio*, as soon as she had sent out the first decision, allowing the appeal on human rights grounds but otherwise dismissing it. Accordingly, Judge Herlihy "had no jurisdiction to

make a second determination. The first determination is the only valid determination".

7. What, then, to do about the first decision? At paragraph 5 of his notice, Resident Judge Appleyard noted that, pursuant to rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, he had first to consider whether to review the decision in accordance with rule 35.

8. Rule 34(1) provides as follows:-

> "(1) On receiving an application for permission to appeal the Tribunal must first consider whether to review the decision in accordance with rule 35."

9. Rule 35 reads as follows-:

> "**Review of a decision**
>
> (1) The Tribunal may only undertake a review of a decision—
>
> (a) pursuant to rule 34 (review on an application for permission to appeal); and
>
> (b) if it is satisfied that there was an error of law in the decision.
>
> (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
>
> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations—
>
> (a) the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside; and
>
> (b) the Tribunal may regard the review as incomplete and act accordingly."

10. At paragraph 7 of his notice, Resident Judge Appleyard stated that he had reviewed the decision and reasons of Judge Herlihy, promulgated by post on 28 January 2019. Subject to consultation with the parties, he proposed "to set aside that determination under Rule 35 and order the relevant proceedings to be dealt with again by that Tribunal". At paragraph 8, Resident Judge Appleyard said that "I do so because I consider that the First-tier Tribunal's Decision and Reasons contains a material error of law in that the reasons clearly show the Judge intended to dismiss the appeal on all grounds, but the decision allowed the appeal under human rights grounds".

11. At paragraph 9 of the notice, Resident Judge Appleyard observed that "Katsonga is clear that the Tribunal cannot use Rule 31 to reverse the

effect of the decision". Rule 31 of the 2014 Rules enables the Tribunal at any time to correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it. In Katsonga, the Upper Tribunal concluded that, in the case of an error of the kind with which we are here concerned, rule 31 could not be employed to substitute (in our case) "dismiss" for "allow" in paragraph 36 of Judge Herlihy's decision. That would be to change the effect of her decision, rather than correcting a clerical mistake or slip.

12. As matters stood in February 2019, Resident Judge Appleyard's conclusion on that issue is readily understandable. Later that year, however, doubt was thrown upon Katsonga by the Court of Appeal in AS (Afghanistan) v SSHD [2019] EWCA Civ 208. In the light of AS, the Upper Tribunal, in MH (review; slip rule; church witnesses) Iran [2020] UKUT 00125 held that a decision which contains a clerical mistake or other accidental slip or omission may be corrected by the First-tier Tribunal under rule 31; and that this included situations where the decision stated an outcome which was clearly at odds with the intention of the judge. Shortly thereafter, the Court of Appeal reached the same conclusion in Devani v SSHD [2020] EWCA Civ 612.

13. On 1 April 2019, Resident Judge Appleyard issued the following-:

> "**DECISION TO SET ASIDE**
>
> 1. Neither party has made representations following my Notice dated 26 February 2019 and issued on 11 March 2019.
>
> 2. For the reasons set out in that Notice and pursuant to rule 35 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 I hereby set aside the first determination of First-tier Tribunal Judge Herlihy issued on 28 January 2019 of the First-tier Tribunal, that being the only valid determination in this appeal, and direct that the relevant proceedings be dealt with again by that Tribunal.
>
> 3. The appeal is to be listed for a fresh hearing at Taylor House before any Judge other than Judge Herlihy."

C. THE DECISION OF JUDGE HERBERT OBE

14. On 19 September 2019, the appellant's appeal came before First-tier Tribunal Judge Herbert OBE. Ms White of Counsel represented the appellant. Mr Symes was the Presenting Officer. The appellant gave evidence through an interpreter.

15. Judge Herbert noted the appellant's claim to be the son of a Taliban fighter, who had been killed, following which the Taliban began using the family home as a safe house for their weapons. The Afghan police believed the appellant also was a Taliban fighter and he therefore left

Afghanistan in order to seek international protection. The appellant made his way to the United Kingdom via Turkey, Bulgaria, Hungary, Austria and France. He told Judge Herbert he was no longer in touch with his family in Afghanistan.

16. At paragraph 22 of Judge Herbert's decision we find the following:-

> "22. The HOPO relied upon the finding of facts made by the previous immigration Judge and therefore didn't challenge any of the appellant's evidence as that was found to be lacking in credibility."

17. Judge Herbert recorded that the appellant told him he had never learned to read or write and only attended school in a mosque in order to learn the Quran in Arabic. He described living conditions in his household, including that a "cow lived indoors during the winter months and was fed with hay which was also stored there" (paragraph 26). The appellant gave evidence to Judge Herbert about the storing of arms by the Taliban.

18. At paragraphs 33 to 35, Judge Herbert considered the witness statement of Julia Fagg, the appellant's social worker. She noted that it had taken a long time for an asylum decision to be made and this had been a stressful period for the appellant, who was otherwise progressing well with his studies. The closer he got to his appeal hearing, the more anxious and worried the appellant was becoming, according to Ms Fagg.

19. Beginning at paragraph 36, Judge Herbert set out the case for the respondent, as recorded in the letter of decision.

20. So far as the Secretary of State's position at the hearing was concerned, Judge Herbert recorded the Presenting Officer's submissions were "that a lengthy decision by Judge Halhy (sic) ought to be followed on the principles of Devaseelam (sic) whereby the starting point for any factual findings subsequently is the initial starting point for an immigration Judges (sic) finding of facts".

21. Beginning at paragraph 58, Judge Herbert (in a decision that – as can already be seen – would not appear to have been carefully proofread) observed that Judge Herlihy had made only passing reference to the appellant's vulnerability, given that he was a child at the date he sought asylum. Judge Herbert considered that Judge Herlihy had given little consideration to the fact that the appellant was a child when he made his claim to the Secretary of State. Judge Herbert considered that regard to the appellant's age must be had in determining credibility (paragraph 39).

22. At paragraph 60, it appears Judge Herbert also considered that the appellant's illiteracy may have had some effect upon the latter's ability to give a coherent or consistent account of his experiences. Judge Herbert also thought that the appellant's "very basic level of education … must have had a significant influence on his ability to recount events accurately" (paragraph 61).

23. At paragraph 65, Judge Herbert noted that "various Immigration Judge training courses I have attended have had several psychologists emphasize that inconsistencies in the evidence can be the hallmark of a truthful account for many asylum seekers who have experienced traumatic events. I bear that advice in mind in this decision" (paragraph 65).

24. At paragraph 66, Judge Herbert took into account Judge Herlihy's adverse credibility findings but found that the inconsistencies which she had identified in the appellant's evidence (such as the number of times the appellant had attended bomb making observations) were not such as to undermine the appellant's credibility, bearing in mind the factors that Judge Herbert had earlier identified.

25. At paragraph 76, Judge Herbert set out the reasons why he was unable to adopt the conclusions of Judge Herlihy. Judge Herbert took into account the appellant's social worker's evidence, regarding the appellant's anxiety. Judge Herbert also took account of the fact that the appellant's experiences in Afghanistan would have been those of a child below the age of 14. Witnessing his father's involvement with the Taliban and the storing and use of weapons "must have been a cause of anxiety". The appellant's lack of education was of significance when assessing his credibility.

26. Having reminded himself at paragraph 78 of the burden and standard of proof, beginning at paragraph 79 under the heading "My Finding of Facts [and] Law Relating to this Appeal", Judge Herbert set out his reasons for differing from the credibility assessment of Judge Herlihy. He found the central core of the appellant's account to be credible. Judge Herbert had adopted a child-sensitive approach to the evidence. He had regard to the Secretary of State's Policy Instruction on Assessing Credibility and Refugee Status, which stated that a true account was not always detailed and consistent in every detail.

27. At paragraph 85, Judge Herbert found that "this 16 year old boy would not be able to provide the details of his father's political activities as an illiterate farm worker's son". On the other hand, notwithstanding his age, Judge Herbert found at paragraph 86 that the appellant had given a detailed account of his father, including the father taking the appellant to a Taliban base to view bombs being made, as well as of the events following his father's death.

28. At paragraph 87, Judge Herbert noted that although the appellant had mentioned for the first time in evidence before him that weapons were wrapped in plastic and hidden in the store where the cow shared the compound, nevertheless "this has a ring of truth about it. This was an indirect answer to a detailed question I asked and there was no hesitation in the answers being given". Given that family shared their house with a cow during the winter months and kept hay there for that purpose, Judge Herbert considered that it was "entirely plausible that both his father and the Taliban may have stored weapons there and covered them in plastic".

29. At paragraphs 89 and 90, Judge Herbert found that there was no inconsistency as to whether the appellant's father made bombs for the Taliban and fought for them; nor that the appellant had lost his mobile phone in Iran.

30. At paragraph 91, Judge Herbert found that there was objective evidence that one of the commanders in the appellant's district in Afghanistan was well-known "and the appellant did correctly name this individual as [ML]".

31. At paragraph 92, Judge Herbert gave his reasons why he placed little weight on the statement of November 2017, as it was unclear whether an interpreter had been used and the form in question had not been signed by the appellant. Accordingly, it was wrong to rely upon inconsistencies in that aspect of the appellant's evidence.

32. At paragraph 95, Judge Herbert explained why he differed from Judge Herlihy as to whether it was implausible that boys of the appellant's age were being recruited as Taliban fighters. At paragraph 96, Judge Herbert considered that the "detailed level of evidence" given by the appellant was "impressive". He had clearly been a child when interviewed and was "seeking to recall events which occurred when he was less than 14 years of age and sometimes considerably before that".

33. Having made those findings of fact, Judge Herbert considered that there would be a well-founded fear of persecution or serious harm, if the appellant were to return to his home area in Afghanistan. It would not be reasonable to expect the appellant to relocate to Kabul "where he has no direct family connection waiting to collect him from the airport", with the result that he would be "subject to exploitation of one [sort] or another" (paragraph 108).

34. Judge Herbert therefore allowed the appeal on Refugee Convention grounds. He dismissed the appeal on humanitarian protection grounds. He allowed it on human rights grounds (Articles 2, 3 and 8).

D. THE SECRETARY OF STATE'S APPEAL

35. The Secretary of State sought permission to appeal the decision. Paragraphs 1 and 2 of the grounds say the following:-

> "1. It is respectfully submitted that this Tribunal exceeded its remit. The appeal had previously been decided upon in an earlier Tribunal decision of 28/1/19. That determination had dismissed the asylum and HP claim, and erroneously, allowed the appeal on human rights grounds. The challenge to this decision greed [sic] that the decision to allow the appeal on human rights grounds had been a "slip of the pen" and the determination was remitted to the First-tier Tribunal with the findings preserved. However, this newly convened Tribunal decided to open up the appeal for a complete re-hearing. It is respectfully submitted that it had no authority to do this.

2. The Tribunal relied upon **Devaseelan**. However, it is submitted that the reasons for doing so, set out at paragraph 76 of the determination, are flawed. In effect the Tribunal has used new evidence in the shape of a social worker report, to re-open the case. However, this report cannot provide any evidence on the relevant country conditions, the facts of the appellant's claim and appeal or anything that was not before the previous Tribunal; it simply sets out an account of the appellant's anxieties based on observation and the appellant's account. The Social Worker could not, of course, have made findings on credibility. Instead, this Tribunal has taken upon itself the task of re-investigating the same evidence considered by the previous Tribunal and reached contrary findings. It is submitted that this is not an appropriate approach."

36. The grounds also made reference to the fact that Eurodac matches showed the appellant had claimed asylum in Hungary and Austria. Before us, Mr Lindsay did not seek to pursue this particular ground.

E. DISCUSSION

37. Before we examine in detail what Resident Judge Appleyard did, it is worth considering what he might have done. As we have seen, Resident Judge Appleyard reviewed the decision under rule 35 of the 2014 Rules. Section 9(4) to (6) of the Tribunals, Courts and Enforcement Act 2007 explains what the First-tier Tribunal may do in the light of such a review:-

> "**9. Review of decision of First-tier Tribunal**
>
> ...
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> (6) Where a matter is referred to the Upper Tribunal under subsection (5)(b), the Upper Tribunal must re-decide the matter."

38. In the present context, it is worth highlighting section 9(4)(a), which gives the power to correct accidental errors in the decision or in a record of the decision. As we have seen, at the time that he reviewed and set aside Judge Herlihy's decision, Resident Judge Appleyard was of the view that the "slip rule" in rule 31 of the 2014 Rules was not available to enable him (or any other Judge of the First-tier Tribunal) to substitute "dismiss" for "allow" in paragraph 36 of Judge Herlihy's decision. It is, however, moot whether section 9(4)(a) of the 2007 Act has a wider ambit than rule 31 and comparable provisions of the procedure rules of other tribunal Chambers. Since we did not hear argument on this issue, we prefer not to express a concluded view.

39. Given that rule 35 of the 2014 Rules permits a review to be undertaken only when the First-tier Tribunal is satisfied that there was an error of law in the decision, not merely that there was an arguable error, one can understand why Resident Judge Appleyard felt compelled to set Judge Herlihy's decision aside. On the basis of Katsonga, it was not possible to amend paragraph 37 under the powers of rule 31. Resident Judge Appleyard may well have concluded that the power of correction under section 9(4)(a) could not be construed more widely than rule 31. He was, therefore, left with no option but to set the decision aside under section 9(4)(c).

40. What, though, did Resident Judge Appleyard mean when he proposed in his notice of 26 February 2019 that the determination of Judge Herlihy should be "set aside" and "the relevant proceedings … dealt with again by [the First-tier] Tribunal"; and in his decision to set aside of 1 April 2019, where he directed "that the relevant proceedings be dealt with again by that Tribunal" by means of "a fresh hearing at Taylor House before any Judge other than Judge Herlihy"?

41. As we have seen, the Secretary of State considers that Resident Judge Appleyard was merely requiring the First-tier Tribunal, at or following the fresh hearing, to substitute a decision dismissing the appellant's appeal on human rights grounds, by reference to the findings of Judge Herlihy, as set out in her decision. For the appellant, Mr Smyth submits that Resident Judge Appleyard's meaning was clear: Judge Herlihy's decision was being set aside in its entirety. The "relevant proceedings" were the appellant's appeal on protection and human rights grounds. They needed to be "dealt with again". That, she says, is precisely what Judge Herbert proceeded to do.

42. We have no hesitation in concluding that Mr Smyth's interpretation is correct. If Resident Judge Appleyard had intended what the Secretary of State submits, it is inconceivable that he would not have made that position plain. This is particularly so, given that the task facing Judge Herbert, on the Secretary of State's construction, would have been a wholly unusual one. On that construction, there would have been no justification for hearing any evidence. Judge Herbert would, in effect, have had to adopt the entirety of Judge Herlihy's reasoning as his own and

make a decision by reference only to that reasoning. If this was what Resident Judge Appleyard intended, it is, to say the least, hard to understand why he did not undertake that task himself.

43. On the face of his documents, Resident Judge Appleyard was, therefore, setting aside Judge Herlihy's decision in its entirety. His direction that Judge Herlihy should not be the judge to hear the appellant's appeal underscores this conclusion.

44. What this means is that the only substantive criticism that can be levelled against Judge Herbert's decision is that he had no need to apply Devaseelan and justify his reasons for departing from Judge Herlihy's adverse credibility findings. Her decision had been set aside and counted for nothing, other than as a record of what the appellant said in evidence on that occasion.

45. The fact that Judge Herbert considered Devaseelan required him to undertake the exercise he performed is not, however, a material error on his part. Mr Lindsay criticised paragraph 76, in which Judge Herbert encapsulated his reasons for not adopting Judge Herlihy's conclusions. That part of Judge Herbert's decision, however, occurs before the part in which, beginning at paragraph 79, Judge Herbert set out his findings of fact. It is with those only that we are concerned.

46. As we have seen, Judge Herbert considered that significant weight fell to be attached to the fact that the appellant was a minor, when he had been interviewed by the Secretary of State; and that he was only some 14 years old at the time of the alleged events in Afghanistan. Judge Herbert examined the evidence regarding the wrapping of weapons in plastic and their being hidden in the hay kept for the family's cow, concluding that this had the "ring of truth about it". The appellant's account was not incompatible with the background evidence. The appellant was able to name a particular individual as one of the local commanders of his district. The inconsistencies regarding the number of times the appellant may have witnessed demonstrations of bomb making was not, in the event, significant, in Judge Herbert's view.

47. These were all findings that were open to Judge Herbert on the evidence before him. The fact that another judge might have reached different conclusions is not an error of law on Judge Herbert's part.

48. Happily, there is no reason why a case of this kind should ever again reach the Upper Tribunal. In the light of MH and Devani, the slip rule in rule 31 should be applied. If Resident Judge Appleyard were today considering the Secretary of State's application for permission to appeal against the decision of Judge Herlihy, he would invoke rule 36 of the 2014 Rules, so as to treat that application as an application for correction under rule 31. Resident Judge Appleyard would amend "allow" in paragraph 37 to read "dismiss". The corrected decision would then be promulgated, giving rise to a right of the appellant to seek permission to appeal to the Upper Tribunal.

49. Given the thrust of MH and Devani is that Judge Herlihy did not make an error of law by writing "allow" instead of "dismiss", it would now not be possible for rule 35 to be employed. As we have seen, rule 35 depends upon there being an error of law, in order to activate the process of review in section 9 of the 2007 Act.

50. If, for some other reason, section 9 were to be invoked, it is in our view plain that the power of correction in section 9(4)(a) can be no narrower than the "slip rule" power in rule 31 of the 2014 Rules (or other comparable rules in the other chambers of the First-tier Tribunal). As we have already said, we must leave undecided whether the scope of section 9(4)(a) is wider than such a "slip rule" power.

F. DECISION

51. The decision of the First-tier Tribunal did not involve the making of an error of a point of law, such as to require that decision to be set aside. The Secretary of State's appeal is, accordingly, dismissed.

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 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.

Signed Mr Justice Lane Date: 26 October 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber