Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08086/2019 (R)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd September 2020	**On 28th October 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

FK
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Holt, Counsel instructed by Turpin & Miller LLP
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal ("the FtT"). As the appeal raises matters regarding a claim for international protection, it is appropriate for an anonymity direction to be made. 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.

Remote Hearing

1. The hearing before me on 22nd September 2020 took the form of a remote hearing using skype for business. Neither party objected. The appellant joined the hearing remotely. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. The hearing was publicly listed, and I was addressed by the representatives in exactly the same way as I would have been, if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

The Background

2. The appellant's against the respondent's decision of 1st August 2019 to refuse the appellant's claim for asylum and humanitarian protection was dismissed by First-tier Tribunal Judge Parkes for reasons set out in a decision promulgated on 13th November 2019.

3. The background to the appellant's claim for international protection is summarised at paragraph [8] of the decision of Judge Parkes. The appellant and his partner attended the hearing of the appeal and gave evidence. The oral evidence of the appellant is summarised at paragraphs [13] to [18] of the decision and the oral evidence of his partner is summarised at paragraph [19]. The judge's findings and conclusions are set out at paragraphs [20] to [39] of the decision. The judge found the appellant's account is not credible and he did not accept the appellant was of any interest to the Taliban or that the appellant was detained as he claimed.

4. At paragraph [34] of his decision Judge Parkes found the appellant would not be at risk upon return to his home area, or in the alternative, he can relocate to Kabul. Judge Parkes rejected the claim that the situation is such that Kabul is not a safe alternative if the appellant does not wish to return to his home area.

5. The human rights claim on Article 8 grounds is addressed by Judge Parkes at paragraphs [37] to [39] of his decision. He found that the appellant cannot meet the requirements for leave to remain as a partner set out in Appendix FM of the immigration rules and there are no insurmountable obstacles to the family life of the appellant and his partner continuing in Afghanistan. Judge Parkes found the removal of the appellant would not be disproportionate and dismissed the appeal on all grounds.

6. The appellant advances three grounds of appeal. First, Judge Parkes failed to apply the correct standard of proof. Second, the decision is vitiated by procedural unfairness by improperly taking judicial notice of issues regarding the financing of routes for asylum seekers to the UK. Third, there are insufficient reasons given for the finding, at paragraph [36], that Kabul is a safe alternative for the purpose of internal

relocation. Permission to appeal was granted by Upper Tribunal Judge Coker on 21st February 2020. She observed:

> "2. It is arguable the First-tier Tribunal erred in law in the manner in which finance was considered and the impact that had on the appellant's credibility. It is arguably unclear on what basis the First-tier Tribunal Judge considered he had knowledge of the method of finance used or why in any event, that impacted upon the credibility of the appellant's account.
>
> 3. The submission regarding incorrect standard of proof is weak, but I grant permission on all grounds."

7. I deal with each of the grounds in the order they were taken by Mr Holt in his submissions before me. Mr Holt acknowledges that the second ground is the strongest of the three grounds. The focus of his submissions was upon that ground.

8. Mr Holt submits that reading paragraphs [23] and [31] of the decision of Judge Parkes, one would be forgiven for thinking that the questions of funding and the arrangements that were made by the appellant's father for the appellant and his brother to flee Afghanistan, were matters that were raised by the respondent or formed some part of the examination of the evidence before the Tribunal. That is a false impression. He submits none of that was in issue prior to the hearing. He submits Judge Parkes appears to have used his personal knowledge, without identifying the source of the information relied upon, and that has impacted upon his assessment of the credibility of the appellant in a manner that is procedurally unfair. The claim has been refused for a reason that in part, the appellant cannot challenge. Paragraphs [23] and [31] form part of the consideration of the claim by Judge Parkes and the findings and conclusions reached. The way those paragraphs appear in the decision, Mr Holt submits, demonstrate they clearly formed a real part of the judge's decision making and the adverse credibility finding made, was therefore made in part upon matters that the appellant has not had any opportunity to address.

9. On behalf of the respondent, Mr Howells accepts that Judge Parkes does not identify in paragraphs [23] and [31], what it was that he relied upon when he was considering the arrangements that had been made for the appellant and his brother to travel from Afghanistan to the UK. Mr Howells referred to the decision of the Court of Appeal in EU Afghanistan & Others v SSHD [2013] EWCA Civ 32, in which Sir Stanley Burnton said:

> "10. Lastly, I should mention a point made by the Secretary of State which I consider to have substance. Unaccompanied children who arrive in this country from Afghanistan have done so as a result of someone, presumably their families, paying for their fare and/or for a so-called agent to arrange their journey to this country. The costs incurred by the family will have been considerable, relative to the wealth of the average Afghan family. The motivation for their incurring that cost may be that their child faces risk if he or she remains with them in Afghanistan, or it may simply be that they believe that their child will have a better life in this country. Either way, they are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in his or her journey here."

10. Mr Howells submits that at paragraphs [23] and [31], Judge Parkes was considering the costs incurred, which will have been considerable, relative to the wealth of the average Afghan family, and how here, the appellant's father was able to fund the journey of the appellant and his brother to the UK. He accepts this was not raised in the respondent's decision or at the hearing before the FtT.

11. Mr Howells submits any error is not material because the judge made a number of adverse credibility findings that were open to the judge. At paragraphs [22] and [24], the Judge sets out his concerns regarding the appellant's failure to pursue his claim for asylum after he first contacted the Home Office in 2015. At paragraph [25], Judge Parkes was surprised that there had been no approach to the family after the Taliban had taken over the area and the appellant's father had fled. At paragraphs [26] and [27] Judge Parkes noted the inconsistencies in the evidence of the appellant regarding the events leading to his abduction and at paragraph [28] the judge noted the inconsistencies in the account

provided by the appellant during interview and what is set out in a Rule 35 report that was before the FtT.

12. Although I have some sympathy with the submission made by Mr Howells that Judge Parkes appears to have had a number of concerns about the account of events relied upon by the appellant and his evidence, I cannot in the end, be satisfied that Judge Parkes would have reached the same decision had he not had regard to issues concerning the financing of routes for asylum seekers to the UK, in his assessment of credibility. Judge Parkes did not make individual findings in relation to the various facets that were at the heart of the claim advanced by the appellant.

13. Judge Parkes made a global finding at paragraph [33] that he did not find the appellant's account to be credible. The extent to which that overall adverse credibility finding was reached by reliance upon the concerns set out at paragraphs [23] and [31] of the decision is unclear. In all the circumstances, I accept, as Mr Holt submits, that the first ground of appeal is not simply a disagreement with a finding that was open to the Judge. At paragraphs [23] and [31] of his decision Judge Parkes states that it is not clear how the appellant's father would have been able to raise the sums needed to transport his sons to the UK at short notice. If it was "not clear", but relevant to the assessment of the appellant's credibility, in my judgement the appellant should have been afforded an opportunity to answer that concern. It was, as Mr Howells properly accepts, not a matter that had been raised either in the respondent's decision or at the hearing of the appeal.

14. The obiter remarks made by Sir Stanley Burnton in EU Afghanistan & Others v SSHD refer to the considerable costs incurred by families relative to the wealth of the average Afghan, but the observations were, in my judgment, made in the context that having incurred the considerable costs, the family are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to

Afghanistan, which would mean the waste of their investment. Although Judge Parkes might well have had concerns about how the appellant's father was able to raise the considerable funds required, the simple point is that the appellant should have been afforded an opportunity to provide an explanation. There may have been no explanation or the explanation may well, in the end have been rejected, but the appellant was entitled to be afforded that opportunity, before an adverse credibility finding was made that in part at least, appears to have been based on that concern.

15. As I am satisfied that there is a material error of law in the decision of Judge Parkes such that it must be set aside, I can address the two remaining grounds, both of which I reject, very briefly.

16. I reject the claim that Judge Parkes did not apply the correct standard of proof. As Mr Holt acknowledges, Judge Parkes cited the correct standard of proof in paragraph [3] of his decision. In assessing the credibility of the appellant and the claim advanced by him, the judge was required to consider a number of factors. They include, whether the account given by the appellant was of sufficient detail, whether the account is internally consistent and consistent with any relevant specific and general country information, and whether the account is plausible. In my judgement, at paragraph [29] of his decision, Judge Parkes was entitled to note that the appellant's account of being taken by the Taliban in place of his father to obtain information would not, by itself, be surprising in the context described, but what is surprising is that it took the Taliban so long to get round to taking the appellant in an effort to find out where his father was. In considering the credibility of the appellant's account, Judge Parkes was in my judgement entitled to express his surprise when considering whether the appellant's account is consistent with general country information and whether that account is plausible. Having correctly directed himself as to the standard of proof, there is nothing in the language adopted by the Judge to establish that he failed to apply the correct standard of proof.

17. Finally, insofar as internal relocation to Kabul is concerned, it is to be noted that at paragraph [34], Judge Parkes found that the appellant is not of interest to the Taliban and his not at risk in his home area. The appellant can return to his home area and so the question of 'internal relocation' did not arise. In any event, in considering whether the appellant could relocate to Kabul, at paragraphs [35] and [36] of his decision Judge Parkes clearly had in mind the submission made on behalf of the appellant that the situation in Kabul has deteriorated to the extent that it could not be considered to be a safe place for relocation. It was in my judgement open to Judge Parkes to conclude, as he did at paragraph [36], that on the evidence and current case law he was not prepared to say that the situation is such that Kabul is not a safe alternative.

18. Although there is no merit in the first and third grounds of appeal, for the reasons set out above I am satisfied that the decision of Judge Parkes is vitiated by a material error of law for the reasons I have set out above and the decision must be set aside. It follows that I allow the appeal.

19. As to disposal, the assessment of a claim for asylum such as this is always a highly fact sensitive task, and the appellant is entitled to have his claim and his credibility properly considered by the FtT. In all the circumstances, I have decided that it is appropriate to remit this appeal back to the F*t*T for hearing afresh with no findings preserved, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. The nature and extent of any judicial fact-finding necessary will be extensive.

Notice of Decision

20. The appeal is allowed. The decision of FtT Judge Parkes promulgated on 13th November 2019 is set aside, and I remit the matter for re-hearing de novo in the First-tier Tribunal, with no findings preserved.

21. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Signed **V. Mandalia** Date: 22nd October 2020

Upper Tribunal Judge Mandalia