



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07560/2019

**THE IMMIGRATION ACTS**

Heard at Birmingham Civil Justice Centre  
On 23 November 2021

Decision & Reasons Promulgated  
On 09 December 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA  
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ZA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms. A. Bhachu of Counsel instructed by Knightsbridge Solicitors  
For the Respondent: Mr. C. Bates, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Watson, promulgated on 23 January 2020, in which she dismissed ZA's appeal against the Respondent's decision to refuse a grant of asylum.
2. We make an anonymity direction, continuing that made in the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge Keane on 19 March 2020. He set out his reasons as follows:

“The grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. First, the Judge at paragraph 21 of her decision accepted that the appellant had obtained a divorce certificate from a court in the United Kingdom. It was therefore incumbent on the judge to consider whether the appellant could return to her home area of Kabul as a divorced woman and safely live. The judge, however, did not do so. The judge may have been influenced towards minimising the importance of the issue by her understanding that the previous judge who heard an appeal against the appellant’s previous claim for asylum had found that she had a large family in Kabul. The previous judge’s determination promulgated on 15 November 2016 was to be found at Annex D of the Home Office bundle. The previous judge merely recorded at paragraph 58 of his decision that the appellant, “has family in Kabul”. The evidential foundation for the finding which the judge purportedly approbated at paragraph 19 of her decision that she had “a large family in Kabul” was uncertain. Similarly, the judge stated at paragraph 19, “she had male family members who could assist her”. Again, the evidential foundation which gave rise to the judge’s finding was uncertain. The previous judge did not refer to male members and evidence which might fairly have given rise to such a finding in the judge’s decision arguably did not present. Second, the judge arguably made a material misdirection as to the test to be applied in arriving at a finding as to where the best interests of the appellant’s son, [J], lay. The judge considered the matter at paragraph 47 of her decision where she stated, “the child is a baby and his interests lie in being with his mother wherever she may be”. The judge arguably had regard to the wrong test in considering where the interests of J lay as opposed to where his best interests lay. The application for permission is granted.”

4. The Appellant attended the hearing. We heard submissions from both representatives following which we reserved our decision. We informed the parties our decision will follow in writing and this we now do.

#### **Error of law decision**

5. We find that the Judge has erred in her treatment of the evidence of the Appellant’s divorce, and by failing to consider whether the Appellant could return to Kabul given that she was divorced from her first husband. We find that the Judge’s credibility findings are infected by her reliance on the findings made in the Appellant’s previous appeal.
6. The Appellant’s previous asylum claim was made when she was married to her first husband, Mr. A. The appeal against this decision was heard in October 2016 by Judge Head-Rapson. He found at [26]: “I do not accept that the Appellant and Mr. A are married. The Appellant’s evidence lacks credibility and substance”.
7. There was a period of over three years between this decision and the decision of Judge Watson. During that time the Appellant had obtained a divorce from the UK courts. This was accepted by the Respondent in her decision. At [18] the Judge correctly states that she must take the findings from the earlier Tribunal decision as her starting point. She states that the Appellant “has obtained a divorce certificate

from a UK court and it is submitted that this shows that there was a valid marriage and that this is a reason to depart from the findings. I note this and deal with it below.”

8. At [21] the Judge deals with this issue and states:

“The change of account of the appellant to that placed before Judge Head-Rapson which was that she wanted to remain in the subsisting relationship with her UK husband, to that placed before me which is that she was in an unconsummated relationship which turned violent immediately after the hearing before the Judge, does not lead me to depart from the findings of that Judge that she is not a witness of the truth. She has produced no police reports despite claiming that she reported violence to the police and she has given no reasonable explanation for not having this evidence. I of course accept that she has obtained a divorce certificate from a UK court. It does not lead me to depart from the findings made by Judge Head-Rapson.”

9. The Judge accepts that the Appellant has obtained a divorce from the UK courts. Despite this finding, which is based on new evidence which was not before the Tribunal in 2016, and which indicated that the Appellant’s marriage to Mr. A had been valid, the Judge then states at [21] that this does not lead her to depart from the findings of Judge Head-Rapson. Although it was open to Judge Watson to find, as Judge Head-Rapson had previously, that the Appellant is not a witness of the truth, it does not follow that Judge Watson was bound to find that the Appellant was not married to Mr. A. Judge Head-Rapson found that the Appellant was not married to Mr. A. The Appellant has now obtained a divorce certificate which has been accepted by the Judge. However, the Judge then states that she is not departing from the findings of Judge Head-Rapson despite her acceptance of the divorce certificate which both indicates a very different set of circumstances, and also casts doubt on the earlier findings relating to the Appellant’s marriage to Mr. A.

10. The Judge makes clear at [25] that she is relying on all of the previous findings – “I do not depart from any of Judge Head-Rapson’s findings made previously”. This includes a finding that the Appellant’s evidence was not credible. We find that the Judge’s failure to explain how she can rely on the earlier findings regarding the Appellant’s marriage to Mr. A in these circumstances, is an error of law which affects the way in which she has treated the entirety of the Appellant’s claim, including her claim that she would be at risk on return on account of her divorce.

11. Having found that the Appellant was divorced from Mr. A, it was incumbent on the Judge to consider the implications of this on the Appellant’s return to Kabul. At [25] the Judge sets out her findings in relation to the Appellant’s account of her marriage. She states:

“I have found the Appellant’s accounts inconsistent with regard to problems that she faced prior to leaving Afghanistan and I do not depart from any of Judge Head-Rapson’s findings made previously. Her account of marriage to Mr. A has lacked consistency and I find that her core account of marrying Mr. A who has a powerful family which has threatened her and her own family due to her divorcing Mr. A is not shown to the lower standard.”

12. It appears from this that she is rejecting the Appellant's account of being married to Mr. A, despite having found that a divorce has been obtained indicating a valid marriage. This is contradictory, and the Judge has failed to explain how she has come to this finding.
13. The Judge then states at [26]:

"I do not depart from the findings of the previous judge. She has not shown that she is at risk from the family of Mr. A or the Taliban."
14. Once more the Judge repeats her reliance on the earlier findings, a statement which is inconsistent with her acceptance of the divorce certificate and which, without further explanation, was at least capable of undermining the findings previously made regarding the Appellant's previous marriage. Judge Head-Rapson made no findings in relation to any risk from the family of Mr. A or the Taliban as this was not the basis of the Appellant's claim at the time. Therefore the Judge's finding that she is not at risk from Mr. A's family on account of her divorce must be in reliance on the previous finding that the Appellant's evidence regarding her marriage was not credible. However, as we have set out above, the Judge has not explained how she is relying on this finding. She has failed to give proper consideration to the Appellant's claim that she was at risk. This is an error of law.
15. In relation to the materiality of this error, at [32] the Judge states:

"If I had found that Devaseelan did not apply and taking the appellant's claim at its highest i.e. that she is a woman who was married and divorced Islamically, and then divorced through the UK court as well and has now re-married an Afghani citizen, I would find that she is able to return with her partner and child. Her partner is free to accompany her, and she will not be a single unmarried woman without support."
16. Despite the Judge's statement, this is not a consideration of the Appellant's claim at its highest as there is no consideration of her position in relation to her ex-husband's family and their attitude to her divorce. Whether or not she were to return to Afghanistan with her current husband, the implications of her divorce from Mr. A needed to be considered. There is no consideration of any threat that she may face as a result of the divorce. The Appellant set out in her witness statement at [14] and [15] her fear of her ex-husband's family. If the Judge had properly taken the claim at its highest, she would need to have considered whether the Appellant would be at risk, but she has not done so. The Appellant also claimed that she would be a victim of "honour" crime, but there is no consideration of that aspect. We find that this paragraph does not consider the Appellant's claim at its highest, and therefore the error of law is material.
17. In relation to the Judge's failure to consider the best interests of the Appellant's child, we find that this ground is also made out. The Judge's consideration amounts to only one paragraph. She states at [47]:

"The child is a baby and his interests lie in being with his mother where ever she may be. I have considered his welfare in accordance with S55 of the Borders

Citizenship and Immigration Act 2009 and there is nothing that requires that the appellant remains in the UK to ensure his welfare needs are catered for.”

18. There is no consideration of the Appellant’s child’s relationship with his father who, although without status, was living with him in the United Kingdom. There is no consideration of his “best” interests, only his “interests”.
19. We have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for the party’s case to be put to and considered by the First-tier Tribunal. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, as the credibility findings cannot stand, and having regard to the overriding objective, we find that it is appropriate to remit this case to the First-tier Tribunal.

### **Decision**

20. The decision of the First-tier Tribunal involves the making of material errors of law. We set the decision aside.
21. The appeal is remitted to the First-tier Tribunal to be reheard de novo.
22. The appeal is not to be listed before Judge Watson or Judge Head-Rapson.

### **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 her or any member of her 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 *K. Chamberlain*

Date 29 November 2021

**Deputy Upper Tribunal Judge Chamberlain**