Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10182/2019**

THE IMMIGRATION ACTS

Determined Under Rule 34	**Decision & Reasons Promulgated**
On 18 March 2021	**On 25 March 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born in July 1991. He appeals against a decision of the respondent dated 11 October 2019 to refuse his fresh asylum and human rights claim made on 10 April 2019. These proceedings concern only the human rights element of his claim.

2. The appellant initially appealed against the refusal of his fresh claim to the First-tier Tribunal in November 2019. In a decision promulgated on 29 November 2019, First-tier Tribunal Judge Sweet dismissed the appellant's appeal against the refusal of his asylum claim, but allowed his appeal on human rights grounds. The Secretary of State appealed. In an *extempore* decision given on 24 February 2020, I found that the decision of Judge Sweet involved the making of an error of law in relation to the findings concerning the appellant's human rights claim, and set that decision aside insofar as it related to the appellant's rights under Article 8 of the European Convention on Human Rights. The appellant did not cross-appeal

against the dismissal of his asylum appeal, and it is not necessary to address that matter further.

Factual background

3. The central issue in these proceedings is whether the appellant is a citizen of Afghanistan. The appellant experiences a range of mental health conditions, including PTSD and a major depressive disorder. The medication and treatment that he would require in Afghanistan would be difficult to source, and would, on his case, present 'very significant obstacles' to his integration, within the meaning of paragraph 276ADE(1)(vi) of the Immigration Rules. The respondent considered that he was of Pakistani nationality. On the respondent's case before the First-tier Tribunal, the obstacles to the appellant's integration in Pakistan would not be as significant, where he would have the support of his family. He had lived in Pakistan previously, and has family there.

4. I found that the reasons given by Judge Sweet for accepting the appellant's claimed Afghan nationality failed to take into account material considerations, namely the law and procedures of Afghanistan for enjoying Afghan nationality, in light of earlier findings of fact by a different judge. The transcript of my 'error of law decision' may be found in the Annex to this decision.

Resumed hearing in the Upper Tribunal

5. I directed that the appeal be re-heard in the Upper Tribunal. The matter resumed before me on 14 October 2020 on a face to face basis, following a delay caused by the pandemic. At the hearing, the appellant produced a document purporting to be an Afghan passport in his name. No such document had been provided previously. It was common ground that the central issue in the proceedings was the appellant's nationality. The presenting officer, Mr Lindsay, applied for an adjournment in order to verify the appellant's Afghan passport, which he retained with the appellant's consent. There had also been a suggestion that the appellant may have lacked capacity to conduct these proceedings, so I directed his solicitors to consider that matter further, with a view to advising the appellant to apply to be represented by a litigation friend. In the written directions I drafted immediately following the hearing, I observed that I had not seen anything that caused me to doubt the appellant's capacity to participate in the proceedings. In the event, no application was made for a litigation friend to represent the appellant, and, in light of the developments set out below, it is not necessary to consider the matter further.

The Secretary of State's concession

6. In written submissions dated 4 November 2020, Mr Lindsay wrote:

> 'Due to current circumstances (Covid-19 pandemic) it has not been possible to obtain a document verification report.

> Accordingly, there is at present no basis for the [Secretary of State for the Home Department] to dispute the genuineness or validity of A's passport. For these reasons A's claim to be a national of Afghanistan is not contested in these proceedings.
>
> The SSHD has reviewed A's claim. In particular, regard has been heard to the concession noted above; the evidence (including psychiatric evidence) produced by A; and the present circumstances in Afghanistan including the guidance set out in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC).
>
> It follows that A's appeal should be allowed pursuant to Article 8 ECHR, with reference to paragraph 276ADE(1)(vi) of the Immigration Rules.'

The appellant's response to the Secretary of State's concession

7. In light of the above concession by the Secretary of State, the appellant's solicitors wrote to the tribunal on 19 February 2021 in the following terms:

> '…the [appellant's and respondent's] positions are clear… the appeal should be allowed without further delay or the need for another hearing.'

Discussion

8. First, I am satisfied that, in light of the agreement between both parties that the appeal should be allowed on Article 8 grounds with reference to paragraph 276ADE(1)(vi) of the Immigration Rules (very significant obstacles to the appellant's integration in Afghanistan), it would be appropriate to determine this matter without a hearing. The power to do so features in rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The criteria for deciding the issue on the papers are satisfied. The appellant has expressly stated that he is content for the matter to be determined without a hearing. The respondent has conceded that the appeal should be allowed. I have had regard to those views, as required by rule 34(2). There are no further issues to resolve in order to determine this appeal. A hearing would be unnecessary, and a strain on the resources of the tribunal. The overriding objective to deal with cases fairly and justly would not be furthered by holding a hearing. An unnecessary hearing would introduce avoidable delay into the procedure. I am satisfied that the matter may be determined without a hearing fairly and justly.

9. Secondly, in light of the respondent's concession following the new evidence relied upon by the appellant, I agree that the appellant's physical and mental health conditions would present very significant obstacles to his integration in Afghanistan. I allow the appeal on human rights grounds, with reference to paragraph 276ADE(1)(vi) of the Immigration Rules. Pursuant to TZ (Pakistan) v Secretary of State for the Home Department [2018] EWCA Civ 1109, where an appellant meets the

requirements of the Immigration Rules, that is positively determinative of the appeal in their favour: see [34], per the then Senior President of Tribunals. This appellant meets the requirements of paragraph 276ADE(1)(vi), as accepted by the Secretary of State, and so succeeds in this human rights appeal on that basis.

10. I therefore allow the appeal.

11. I maintain the anonymity order previously in force.

Notice of Decision

This appeal is allowed on human rights grounds.

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 *Stephen H Smith* Date 18 March 2021

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The appellant only succeeded in these proceedings because he produced a passport at the last minute. Had he done so earlier, the need to bring these proceedings could have been avoided altogether. A fee award is not appropriate.

Signed *Stephen H Smith* Date 18 March 2021

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10182/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 February 2020	
Extempore decision	.....

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms N Amin, Counsel, instructed by Sohaib Fatimi Solicitors

DECISION AND REASONS

The Secretary of State appeals against a decision of First-tier Tribunal Judge Sweet promulgated on 29 November 2019. The judge allowed, on human rights grounds, an appeal by the appellant before the First-tier Tribunal against the Secretary of State's decision to refuse his asylum and humanitarian protection claim. The Secretary of State's decision was dated 15 March 2019. For convenience, I will refer to the parties as they were before the First-tier Tribunal.

The decision under challenge was a refusal of a fresh claim made by the appellant. On 29 July 2015, he claimed asylum. That claim was refused on 2 December 2015 and an appeal against that refusal was dismissed by the First-tier Tribunal in a Decision and Reasons promulgated on 11 October 2016. The appellant was refused permission to appeal against the earlier decision of the First-tier Tribunal, with the effect that he exhausted all available avenues of appeal against that decision in January 2017.

The basis of the appellant's fresh claim related to his claimed risk of being persecuted on Convention grounds in Afghanistan. It is not necessary for me to say any more about that aspect of his further submissions, as the judge dismissed the appeal on asylum grounds, and the appellant has not sought to appeal against those findings.

The Secretary of State appeals against the human rights limb of the judge's decision. Judge Sweet accepted the appellant's evidence that he was a citizen of Afghanistan. That was a matter of dispute between the Secretary of State and the appellant, as it had been in the earlier proceedings before the First-tier Tribunal in 2016. Judge Sweet accepted the evidence of two witnesses provided by the claimant, both of whom claimed to have known the claimant in Afghanistan and considered him to be an Afghan citizen. The judge allowed the appeal on the basis that the appellant's mental health and other circumstances relating to his prospective return to Afghanistan meant that there would be very significant obstacles to his integration for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules. The basis for the judge allowing the appeal on those grounds arose from two medical reports and a country expert report relating to the likely circumstances of the appellant's return.

One of the reasons the respondent considered the appellant was from Pakistan was because he has a mother and a sister there. He had returned there following an earlier failed attempt to claim asylum in France. As such, contended the Secretary of State, it was not accepted that the appellant was a citizen of Afghanistan, nor that he would be returning to Pakistan without the assistance of any family or other local support. On the Secretary of State's case, the appellant before the First-tier Tribunal would be returning to Pakistan, back to his family and back to his country of nationality.

Permission to appeal

The Secretary of State was granted permission to appeal by First-tier Tribunal Judge Fisher on the basis that the judge had failed to give sufficient reasons for accepting that the appellant was a citizen of Afghanistan.

Discussion

The operative analysis of the judge was brisk. Brevity is, of course, to be commended where appropriate. However, it is trite law that the parties to litigation should be placed in a position to know why they have lost or won, as the case may be. The judge took as his starting point the decision of First-tier

Tribunal Judge Morron promulgated on 11 October 2016. In those proceedings the appellant had produced a number of "to whom it may concern" letters from British citizens of Afghan origin. Those letters stated that the authors had known the appellant for periods ranging from six to ten years concluding that he was an Afghan national born on 10 July 1991. The judge found that it was unlikely that the authors of those letters would know the appellant's date of birth.

Significantly, Judge Morron noted that neither the appellant nor the authors of those letters were able to state how they had known each other for that long. The dates that had been given in those letters were inconsistent. One author, a Mr K, purported to have known the appellant for six years, which would have been since 2010. That was inconsistent with the accepted chronology of this appellant's travel outside of the United Kingdom and subsequently to the United Kingdom, which placed him in France from 2009 to 2013, followed by ten months in Pakistan, arriving in the UK in 2015. The author of another letter, a Mr J, stated that he had known the appellant for seven years, which would have been since 2009.

There is yet another letter by an author who purported to have known the appellant for eight years but the signatory to that letter was different to the person whose name in which the letter was purportedly written. None of the letters featured dates, none contained statements of truth and none of the authors of those letters attended the hearing. Judge Morron noted at [60], "it is inherently unlikely that the writers can have known the appellant for the periods claimed".

Judge Morron proceeded to analyse a membership card which the appellant had produced in support of his claimed Afghan nationality. It was a Worker's Recognition ID card for the "[S] Vegetable Oil Industry", where he said he worked. The appellant was unable to give an account that was consistent with his claimed employment under cross-examination before Judge Morron. The card noted the appellant as being a "ventilation controller". However, in cross-examination, when asked what work the appellant did for the [S] Vegetable Oil Industry he did not say that he was a ventilation controller. The judge recorded the appellant as stating that he escorted vehicles from the border to Kabul and was able to provide spare parts. He described his job as being one of an escort or a security man. The judge noted that the appellant spoke Pashto, which is one of the languages spoken in Afghanistan, but recorded at [65] that Pashto was nonetheless spoken in border areas of Pakistan and that uncertainty over the appellant's nationality was part of the evidence which needed to be weighed in the scales in making a determination.

It was against that background that the judge in the present matter, Judge Sweet, approached the issue of the appellant's nationality. None of the authors of the letters of support before the First-tier Tribunal in 2016 wrote to support the appellant on this occasion. The appellant did, however, provide two witnesses who did attend to give evidence on his behalf. It is Judge Sweet's analysis of the evidence of these witnesses which the Secretary of State now seeks to challenge.

At [38], the judge said:

> "Some new evidence which has been produced since the previous determination and in my view this goes to one of the main issues, namely in respect of his nationality [sic]. Apart from the appellant's own evidence, he has brought two further witnesses, [MJ], who has known the appellant since 2015 in the UK. He knew the appellant's father and his family since when he was a child, and comes from the same Pashtun subtribe of [A] as the appellant. It is a small tribe and the appellant's father was well-known in the community. The second witness, [SW], knew the appellant in Kabul in 2007 when he was working for an oil business called [S] Oil Company. They met on a number of occasions and he later met him in 2016 in Edgware Mosque. He is also satisfied that the appellant is a citizen of Afghanistan."

The operative reason of Judge Sweet relating to the appellant's nationality may be found at [39]:

> "Taking into account this further evidence – and the written statement of [QS], who was not called as a witness – I am satisfied that the appellant is indeed a citizen of Afghanistan."

Ms Amin submits that the judge had correctly addressed his mind to the previous decision of the First-tier Tribunal pursuant to the Devaseelan principle as set out in [37] of the judge's decision. She also submits that the judge can be taken to have had regard to the entirety of the evidence before the Tribunal. She submits that it was not necessary for the judge to repeat back to the parties the evidence upon which the appellant had sought to rely and that brief reasons can be sufficient reasons provided that the parties know why the judge reached a conclusion that the judge reached. She further submitted that the basis upon which the Secretary of State sought and obtained permission to appeal was on the basis of sufficiency of reasons rather than a broader perversity or irrationality basis.

I accept the submissions of the Secretary of State. The reasons given by the judge at [39] provide even a well-informed reader with understanding of the matters and evidence that were before the Tribunal with no reasons as to why the judge is or was satisfied that the appellant was a citizen of Afghanistan. There is no operative analysis on the part of the judge as to what the features of the witnesses' evidence were which led him to reach the conclusion that the appellant was an Afghan citizen. When one examines the statements of the two witnesses in question these concerns are reinforced. In the statement of SW at [5] it states:

> "I am certain that he [the appellant] is Afghan. There is no doubt about that. I am from the Pashtun tribe and he also is from the Pashtun tribe. I know an Afghan when I see one. I can tell from his accent, dialect and from his characteristics. I know him from Afghanistan, and he used to work for an Afghan company. That company would not employ a Pakistan national. All his friends that I have seen are from Afghanistan and he has no Pakistani friends."

The difficulty with the judge's apparent reliance on SW's statement is that it features no qualitative analysis of the criteria for an individual to be granted Afghan citizenship or recognised as an Afghan citizen. Nowhere in the judge's decision is there any reference to the requirements under Afghan law for an individual to be recognised as one of its citizens. The burden of proof for establishing nationality in cases of disputed nationality is upon the appellant before the First-tier Tribunal in the first instance. It appears that no submissions were made, or expert evidence obtained, relating to the legal framework for the conferral or acquisition of Afghan nationality. There was no material before the judge which justified the conclusion that the appellant before the First-tier Tribunal was a citizen of Afghanistan.

Similarly, in relation to the evidence of MJ at [6] MJ writes in his statement at [4]: "His [the appellant's] accent is that of a Pashtun Afghan. I am also Pashtun. We are both from Nangahar province, [R] district, [B] village. There are hundreds of people from our tribe who are settled here." Again, although the evidence of MJ was that he holds a sincere belief that the appellant is a citizen of Afghanistan there was no material in his statement which demonstrated the basis upon which the judge could properly reach that conclusion. Ms Amin sought to dissuade me from concluding that there was a perversity or rationality-based feature to the Secretary of State's challenge. In my view, the duty to give sufficient reasons encompasses a duty to give reasons which are consistent with the underlying legal requirement incumbent upon a Tribunal when reaching particular findings of fact.

In the present matter, the judge relied on unsubstantiated, albeit likely to be sincere assertions on the part of two witnesses but had no regard to the underlying legal framework in relation to Afghan nationality. Accordingly, quite apart from the fact that [39] in isolation provides no reasons for the operative conclusions reached by the judge in relation to the nationality issue, the evidence that was before the judge could not have admitted of that conclusion in any event and the judge's findings were, therefore, irrational.

In light of these conclusions it follows, as was accepted by both parties at the hearing, that the judge's analysis of whether the appellant before the First-tier Tribunal would face very significant obstacles to his return to Afghanistan must similarly be flawed. The judge was considering the likely return of the appellant to a country in relation to which his nationality was not yet or not properly established.

I find that the decision of Judge Sweet involved the making of an error of law. The error of law was such that the decision must be set aside. As there was no challenge to the findings of Judge Sweet concerning the substantive protection elements of the appellant's appeal, I preserve those findings.

I direct that the matter be relisted in the Upper Tribunal for consideration of the appellant's nationality and whether he would face very significant obstacles to his integration in his country of nationality, or whether there are any other reasons pursuant to the United Kingdom's obligations under Article 8 of the European Convention on Human Rights preventing his removal.

I maintain the anonymity order already in force.

Notice of Decision

The decision of Judge Sweet involved the making of an error of law. It is set aside, save for his findings on the protection elements of the appellant's appeal, which are preserved.

The matter is to be redetermined in the Upper Tribunal, as set out in the reasons, above.

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.

Signed *Stephen H Smith* Date 2 March 2020
Upper Tribunal Judge Stephen Smith