Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06792/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th January 2022	**On 26th January 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

AS
(ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Sellwood, of Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 1991. He was first detected in the UK in 2009 when he was arrested as an illegal entrant. He said he came to the UK a few days previously. He claimed asylum, saying he was a minor. His asylum claim was refused and he was found not to be a minor by the Secretary of State in a decision dated 23rd October 2009. His asylum appeal was dismissed on 26th January 2010 by

Judge of the First-tier Tribunal Frankish. The appellant was then removed to Afghanistan on 9th March 2010.

2. On 12th July 2015 the appellant claimed asylum in Hungary. He then travelled via France to the UK and claimed asylum on 18th August 2015, having entered the UK illegally. There was a take back request under the Dublin III Regulation but that did not proceed. The claim was refused on 13th October 2015 in a decision which refused and certified the claim on third country grounds. In 2018 the appellant initially agreed to be processed under the voluntary returns scheme (VRS), but then refused to sign the disclaimer and the VRS application was closed. On 13th June 2018 the appellant made further submissions and sent in further documentation in support of a fresh claim. This was refused as a fresh claim on 30th August 2018.

3. On 15th November 2018 the appellant was convicted at Manchester Crown Court of supply of heroin and was sentenced to 20 months imprisonment following a guilty plea. On 26th November 2018 a decision was made to deport him by the Secretary of State. In response, on 4th January 2019, the appellant made protection and human rights representations. These representations were refused on 1st July 2019. His appeal against the decision refusing his human rights and protection claim was firstly dismissed by Judge of the First-tier Tribunal Housego in a decision promulgated on 11th October 2019, however Judge Housego was found to have erred in law and the First-tier Tribunal decision was set aside with no findings preserved by Upper Tribunal Judge Pickup in a decision promulgated on 6th February 2020. The appeal was then remitted to be remade by the First-tier Tribunal. The appeal was then allowed by First-tier Tribunal Judge Raikes in a determination promulgated on the 10th November 2020.

4. Permission to appeal against the decision of Judge Raikes was granted to the Secretary of State by Judge of the First-tier Tribunal Lever on 3rd December 2020 on the basis that it was arguable that First-tier judge Raikes had erred in law. Upper Tribunal Judge Kamara found that the First-tier Tribunal had erred in law in a decision promulgated on 10th May 2021 which I append as Annex A to this decision. Upper Tribunal Judge Kamara set aside the decision and all of the findings, and ordered that the decision be remade de novo in the Upper Tribunal.

5. On 10th November 2021 Upper Tribunal Judge Rintoul held a case management review hearing for this appeal and it was agreed that the matter would be listed for a substantive hearing. At this hearing the representative for the respondent, Mr S Whitwell also agreed to reconsider the decision of the Secretary of State.

6. The matter came before me pursuant to a transfer order to remake the appeal. Unfortunately the Upper Tribunal interpreter did not attend the hearing, but in light of the hearing being brief and procedural, as set out below, the appellant, who was represented by counsel, was content for

it to proceed and he was assisted by his friend and witness who provided an explanation of the hearing in Pushto.

Evidence & Submissions – Remaking

7. Mr Lindsay for the Secretary of State explained that for reasons which were not clear Mr Whitwell had not been able to review the decision refusing the appellant's protection and human rights claim. However, he, Mr Lindsay, had now done this and made a decision that the decision should be withdrawn. He would be recommending to the caseworker that a grant of leave was made given the concession that the appellant would not be safe in Nangahar, and in light of the evidence in the latest CPIN on Afghanistan which meant that it was unlikely that it would be safe for the appellant to relocate to Kabul. Mr Lindsay said that he would also be recommending any grant of leave was expedited. He agreed to pass on to the caseworker any submissions as to the type of leave that should be granted that Mr Sellwood might wish to make on behalf of the appellant.

8. Mr Lindsay submitted that the appeal should now be dismissed in light of the withdrawal of the underlying decision refusing asylum and the human rights claim. He helpfully drew my attention of the decision in SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 64 (IAC). He submitted that it was clear that the Secretary of State was able to withdraw the decision, and that Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 does not require the consent of the Upper Tribunal for this to happen. He submitted that the Upper Tribunal should now dismissed the appeal as it was not appropriate to continue with it in all the circumstances of the case. He argued that (4)(a) of the headnote in SM indicated that it was a consideration that the Secretary of State should ordinarily be the primary decision-making and in this case there was a lot of post-decision evidence and there had been a fundamental change in circumstances in Afghanistan. Further, at (4) consideration should be given to the overriding object, and given the appellant was a vulnerable person and there was no procedural need a hearing should not go ahead.

9. Mr Sellwood did not make any submissions for the appellant but indicated that he was happy for the Upper Tribunal to proceed to formally dismiss the appeal on the basis of underlying decision having been withdrawn by the respondent and in light of the indication that a grant of leave to remain to the appellant was likely.

Conclusions - Remaking

10. I conclude for the reasons above, as set out by Mr Lindsay, that it is appropriate to formally dismiss this appeal in light of the respondent having withdrawn the underlying decision to refuse the appellant's

human rights and protection claim and given the indication that it is likely that the appellant will receive an expedited grant of leave to remain.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. Upper Tribunal Judge Kamara set aside the decision of the First-tier Tribunal with no findings preserved.

3. I re-make the decision in the appeal by dismissing it on all grounds in light of the underlying decision of the respondent refusing leave on protection and human rights grounds having been withdrawn.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 11th January 2022
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision of UTJ Kamara

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Raikes, promulgated on 10 November 2020. Permission to appeal was granted by First-tier Tribunal Judge Lever on 3 December 2020.

Anonymity

2. Such a direction was made previously and is reiterated below because this is a protection matter which includes evidence of the respondent suffering from mental health disorders.

Background

3. The respondent was encountered by immigration officials on 23 February 2009 during a traffic stop. He claimed to be aged 15 and applied for asylum. He was assessed by social services as being over 18 years old. The respondent's asylum claim was refused shortly thereafter, his appeal against that decision was dismissed by First-tier Tribunal Judge Frankish on 26 January 2010 and he was removed to Afghanistan on 9 March 2010. The respondent was next encountered by UK immigration officials on 18 August 2015, following which he claimed asylum again. It was apparent that he had sought asylum in Hungary and his claim was refused and certified on third country grounds on 13 October 2015. The deadline to return the respondent to Hungary was missed and his asylum application was considered in the UK. On 30 August 2018 that claim was refused with no right of appeal.

4. On 15 November 2018, the respondent was convicted of supplying a controlled class A drug (Heroin) and sentenced to 20 months' imprisonment. He made further representations on protection and human rights grounds which were refused in a decision dated 1 July 2019.

5. The respondent's appeal against the decision of 1 July 2019 was initially dismissed by First-tier Tribunal Judge Housego in. a decision promulgated on 11 October 2019. That decision was set aside in its entirety by the Upper Tribunal in a decision promulgated on 6 February 2020. Judge Raikes heard the appeal, de novo, on 22 October 2020.

6. The basis of the respondent's asylum claim, briefly summarised here, is his fear of the Taliban who consider him to be a spy and a traitor after his madrassa was attacked and his teacher arrested. These events occurred prior to the respondent's departure from Afghanistan in around 2009. Following his removal to Afghanistan in 2010, the respondent was summoned to appear before the Taliban in Pakistan but was ultimately released and thereafter arrested by US forces who detained him for around 3 and half years. Upon returning to his area, the respondent discovered that he was still of adverse interest to the Taliban, and this led him to flee Afghanistan again.

7. The Secretary of State rejected the respondent's claim primarily on the basis that the decision of the First-tier Tribunal who considered his appeal in 2010 had found his claim to be an invention.

The decision of the First-tier Tribunal

8. Prior to the hearing before the First-tier Tribunal, the Secretary of state conceded that owing to security issues, the respondent could not return to his home area of Nangahar, however it was not accepted that he could not relocate to Kabul.

9. The respondent was treated as a vulnerable witness owing to his mental health concerns. Medical evidence referred to diagnoses of PTSD and a recurrent depressive disorder and that the respondent presents with a significant risk of self-harm and suicide. There was also a report from a country expert which addressed the poor provision of mental health services in Kabul. Judge Raikes allowed the protection appeal under the 1951 Convention primarily because the respondent could not be reasonably expected to relocate to Kabul.

10. The judge also allowed the appeal on Article 8 grounds, concluding that the respondent had exceptional vulnerability on mental health grounds which met the threshold of very compelling circumstances.

The grounds of appeal

11. There was one ground of appeal, that the First-tier Tribunal failed to give adequate reasons for findings on a material matter. It was argued that there was a failure to identify the refugee Convention reason, no explanation as to why the appellant would be at risk from the Taliban or what the impact would be on the appellant's mental health in relation to his relocation to Kabul. It was further said that the judge failed to give adequate reasons as to how the "very compelling circumstances" threshold was met under Article 8.

12. Permission to appeal was granted on the basis sought, with the judge granting permission commenting that there was an inadequate analysis of the medical evidence.

13. No Rule 24 response was received from those representing the respondent.

The hearing

14. There was some prior discussion between the representatives as to the terms of the Secretary of State's concession, referred to at [21] and [29] of the decision and reasons.

15. Mr Lindsay made the following points which expanded somewhat on the grounds of appeal and to which Mr Sellwood raised no objection. Mr Lindsay clarified that the Secretary of State's position was that there was no concession at any point that the respondent was a refugee in his home area. The terms of the Secretary of State's concession were of no more than Article 3 type harm. The judge's findings on internal relocation amounted to a misdirection of law. Reliance was placed on the grounds of appeal and grant of permission. There was a clear error that the respondent was a minor at the time of the original appeal in

2010 because he was found to be an adult although he claimed to be aged 15. The mental health diagnoses rested upon claims made by the respondent in the past, which were found not to be true. The opinion of Dr Galappathie was based on a discredited account of the respondent having been groomed in a madrassa as a suicide bomber. At the same time as accepting the medical opinion, the First-tier Tribunal stated that there was no reason to depart from the previous tribunal's findings. There was no analysis by the tribunal of the facts which were previously found to be untrue, and no reasons given for accepting Dr Galappathie's conclusion.

16. Mr Lindsay also argued that there was an absence of anxious scrutiny. The judge attached weight to the diagnoses both for the protection and Article 8 claims and no consideration was given as to whether the respondent was lying about events post-2010, given that the judge accepted that he fabricated his previous claim. The concession point was relevant to the absence of a clear finding as to the Convention reason which the judge was required to make before internal relocation issue arose. There were no findings under Article 15 (c) given the concession. In addition, the brief Article 8 findings rested on incidents which never occurred. Mr Lindsay submitted that the Secretary of State's appeal should be allowed, the decision of the First-tier Tribunal be set aside with no findings preserved and the matter retained for remaking in the Upper Tribunal.

17. Mr Sellwood argued as follows. The extent of the concession was relevant as to how the judge approached the refugee protection and humanitarian protection issues. Counsel for the respondent, Ms Foot, had provided a witness statement and exhibited her handwritten notes of the hearing. The wording of the concession was set out in an email from the Presenting Officers Unit casework team. None of the aforementioned documents had been provided to the Upper Tribunal and therefore Mr Sellwood had to narrate the contents. In essence, the Secretary of State maintained the decision, would not be pursuing an argument that the appellant could return to his home area of Nangahar and identified internal relocation to Kabul as the issue before the First-tier Tribunal. Ms Foot's notes indicated that the respondent's case was put on refugee protection grounds as well as Article 15(c) and Article 8 and the judge had concluded that the appellant's fear of the Taliban and indiscriminate violence was no longer an issue. There was no material error in failing to identify a refugee Convention reason because the only issue was internal relocation. There was similarly no need for any explanation as to why the appellant was at risk of the Taliban given the concession. The respondent's mental health was just one aspect of the judge's assessment of the reasonableness of internal relocation. The medical evidence was not limited to Dr Galapatthie's report and included medical records including those from the IRC where the respondent was detained. It was not right to say that Dr Galapatthie's report was based on the pre-2010 events and his report concurred with other psychiatric evidence. There was also a country expert whose evidence was relevant as to whether relocation was unduly harsh. The First-tier Tribunal was entitled to find that it would be unduly harsh for the respondent to relocate to Kabul. Lastly, the judge had the correct principles in mind in dealing with the Article 8 case and it was hard to see why there would not be a violation of Art 8 if the respondent was at risk under the refugee Convention.

18. In reply, Mr Lindsay reiterated that the concession was solely regarding indiscriminate violence in the respondent's home area. The judge was wrong to find that the medical evidence was consistent, because Dr Elanjithara's opinion

differed from that of Dr Galapatthie. Dr Galapatthie's reliance on discredited events could be cured by his reliance on the post-2010 events.

19. Mr Sellwood offered to email me the Secretary of State's email regarding the concession as well as Ms Foot's witness statement and exhibits. I therefore reserved my decision.

Decision on error of law

20. The parties were both in agreement that the Secretary of State's concession related only to the Article 15(c) risk to the respondent in Nangahar, his home area. The email from the POU which was sent on 15 October 2020, stated as follows:

"The respondent maintains her decision and the hearing on 22/10/2020 can proceed. However the respondent will not be pursing the argument that the appellant can return to his home area of Nangahar and therefore the argument will be internal relocation to Kabul as previously discussed. This hopefully will have narrowed the issues for the appeal to assist all parties."

21. The judge's understanding of the concession differed. While at [21] of the decision and reasons it was noted that the respondent accepted that the appellant could not return to Nangahar because of the "*current security situation,*" at [64] the judge said the following:

"Given the concession made by the Respondent regarding his home area, I am satisfied that his claims in respect of his well founded fear of persecution by the Taliban on return to his home area, as well as his claim to require humanitarian protection due to the very high levels of indiscriminate violence in his home area are no longer in issue."

22. The summary of the judge's decision, on page 22, does not clarify on what basis "the appeal is allowed." There is no mention of either the 1951 Convention or Humanitarian Protection. While the main issue before the judge was internal relocation either under the 1951 Convention or in relation to a claim for Humanitarian Protection, there remained a requirement for an assessment of the respondent's claims owing to the fact that the medical evidence indicated that his mental health state was directly linked to his past experiences. It is clear from the emailed concession, that the Secretary of State was standing by the decision letter in which the claimed facts of the respondent's protection claim were firmly rejected. It is clear that the judge misdirected herself as to the terms of the concession and this alone amounts to a material error of law.

23. The judge did not seek to depart from the determination of Judge Frankish which concluded that the appellant's claim was entirely invented. However, her comment that the previous claim was of "*very limited relevance*" is misplaced given that the respondent's current issues are very much connected to the circumstances rejected by Judge Frankish and the medical evidence is based, to a significant extent, on discredited facts. The judge has treated the respondent's post-2010 claims as being truthful without any analysis, perhaps as a consequence of her misunderstanding as to the extent of the concession. There was a need for a clear finding as to whether the respondent was a refugee. That finding was absent and amounts to a further material error of law.

24. The limited findings made by the judge at [65-68] as to the respondent's personal circumstances are unreasoned. There is also a lack of anxious scrutiny paid to the conflicting opinions of the medical experts or any individual assessment of the medical evidence. That error also affects the Article 8 findings. Consequently, the Secretary of State was correct to argue in the grounds that there was a dearth of adequate reasoning.

25. The respondent has yet to have an adequate hearing of his claim in the First-tier Tribunal however, this matter has previously been remitted and I accept that it would be more appropriate for the Upper Tribunal to retain this matter.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The appeal is to be reheard, de novo, before any Judge of the Upper Tribunal.

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: Date: 22 April 2021

Upper Tribunal Judge Kamara