IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004382

First-tier Tribunal No: PA/55867/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 3rd of December 2024

Before

UPPER TRIBUNAL JUDGE BULPITT
DEPUTY UPPER TRIBUNAL JUDGE LAY

Between

DSM
(ANONYMITY ORDER MADE)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Edward Nicholson, Counsel instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mr Peter Deller, Senior Home Officer Presenting Officer

Heard at Field House on 22 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a Russian national, of Chechen origin, whose asylum and human rights claims were refused by the Respondent in a decision dated 15 August 2023. His appeal against that refusal was heard by First-tier Tribunal

Judge Freer (hereafter, "FTJ") on 23 July 2024, with a determination promulgated 26 July 2024. The FTJ dismissed the Appellant's appeal on all grounds.

2. The Appellant sought permission to appeal to the Upper Tribunal. Permission was granted by First-tier Tribunal Judge G Cox on all three pleaded grounds, in a decision dated 20 September 2024.

3. At the error of law hearing, there was a 488-page composite bundle. Bundle references in this determination are in the format as follows: [CB: XX]: [Composite Bundle: page number].

4. The bundle also included a verbatim transcript of the First-tier proceedings on 23 July 2024 [CB: 19] which was obtained by those representing the Appellant post-grant of permission.

The grounds of appeal on which permission had been granted

5. Ground I contended that the FTJ, having acknowledged the Appellant to be a Vulnerable Witness for the purposes of the Practice Direction, had failed to take those same issues into account when evaluating overall credibility of the written and oral evidence.

6. Ground II contended that the FTJ had "erred in failing to allow the video evidence the Appellant produced to be admitted into evidence" on the day of the appeal. In the written application for permission this ground was also framed (at paragraph 9) as a procedural unfairness on the basis that the FTJ had not indicated that they were minded not to admit the evidence and thus the Appellant had not had opportunity to address the issue [CB: 15].

7. Ground III contended that an expert country report, which authenticated a military conscription document, was not taken into account "in the overall assessment of the Appellant's credibility" [CB: 16].

Submissions & concessions

8. At the outset of the hearing, Mr Nicholson was invited, at least initially, to focus on Ground II, in light of the transcript of the First-tier hearing having been obtained post-application for permission. He submitted that Ground II was buttressed by what can be seen on the face of the transcript: that the FTJ had decided, after the hearing, without indication to the parties during the hearing, that the "video evidence" would not in fact be admitted as evidence in the appeal; that paragraph 50 of the determination states that "it is deeply unfair to allow [the videos] into the evidence considered by this Court" when the Home Office Presenting Officer had not objected to the inclusion; and that Counsel for the Appellant was therefore not given an opportunity to argue for their inclusion and/or take appropriate procedural steps in light of the FTJ's decision on an important issue of evidence.

9. We were grateful to Mr Deller, for the Secretary of State, for his considered and realistic concession that, contrary to the Rule 24 response (which had, it seems, been drafted without sight of the transcript), there was indeed a procedural unfairness, amounting to a material error, in the procedure by which prima facie relevant video evidence was handled and then excluded.

10. After further discussion, Mr Deller also conceded that there was a material error in the FTJ's consideration of the medical evidence of the Appellant's vulnerability (Ground I) and that the issue of the expert's view [CB: 82 & 94-95] on the authenticity of the military summons/conscription document had not been dealt with, adequately or at all, by the First-tier Judge (Ground III).

Our Conclusions

11. We agree that Ground II was made out. While we have concerns that there was an attempt by the Appellant to adduce video evidence (contained only on his mobile phone) on the very day of a First-tier hearing, and there may well have been reasonable arguments against admitting that evidence, it is inescapable - on the face of the transcript - that a strong impression was given by the FTJ that the evidence would be admitted – and not only because the HOPO had assented. Counsel for the Appellant was even permitted to ask questions about the videos during examination-in-chief [CB: 27].

12. Or, to put it another way: there is no indication that the FTJ is minded *not* to admit them. The upshot is that, as of the end of the hearing, and the close of the evidence, ahead of and then throughout the final submissions, neither party knew that the evidence was not going to form part of the FTJ's consideration of the appeal.

13. Procedural fairness required that the Appellant knew this. It may have led to an adjournment application or to the Appellant's Counsel approaching the oral evidence in a different way. While the FTJ, at paragraphs 46 to 50, certainly gave reasons for not admitting the late evidence, those were not arguments and reasons reflected in any set of submissions made during the hearing, nor was the Appellant in a position to counter them owing to a justified assumption that the evidence had been admitted and that the real debate was over the weight to be attached to it. It also cannot be said that the FTJ has dealt with the matter *de bene esse* or otherwise in a way that is sufficiently clear so as to assuage our doubts.

14. We do not, however, offer a view on the strength or merits of the video evidence. We have not seen the videos. There is no agreed written summary of the precise contents. But it remains the case that this was evidence which the A had cited in his Screening Interview ("I have a video on my phone showing people wearing masks asking my mother of my whereabouts") and elsewhere (see CB: 70 which refers to the appellant showing his GP the video soon after his arrival in the UK). It plainly formed part of his subjective account of being targeted/of adverse interest in Chechnya and, to that extent, it was capable of assisting his efforts to establish the reasonable likelihood of past events.

15. We remind ourselves that "committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings" will be an error of law in this jurisdiction: per para 9(vi) *R (Iran) v SSHD* 2005 EWCA Civ 982.

16. Given the nature of the procedural unfairness, and its impact on the hearing, in our view this is an appeal which should be remitted *de novo* to the First-tier Tribunal. Both parties agreed with this approach. We have had regard to Section 7 of the "Senior President's Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal" (SPT Ryder, 11 June 2018) and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC).

Remittal is not the usual course but it is appropriate in the circumstances of this appeal where there has been an unfairness in the procedure followed.

17. In light of our conclusions on Ground II (procedural unfairness) leading to *de novo* remittal on that basis alone, and since there was a concession from the Secretary of State in that regard, we did not consider it necessary or proportionate to hear full argument on Grounds I and III upon which permission had been granted. But (i) we note of course that the Secretary of State formally conceded that Grounds I and III had also been made out (ii) it will be for a new First-tier Judge to consider all the evidence, existing and updated (if any), and that will be done so afresh, with no preserved findings; (iii) Ground III was plainly a discrete issue advanced in the Appeal Skeleton Argument [CB: 401] and needed to be resolved, regardless of any other adverse credibility findings.

18. We also note that the procedural irregularity that occurred in the hearing before the FTJ arose following a failure by the Appellant's representatives to serve the videos in accordance with the standard directions for the service of evidence. Whilst that does not diminish the unfairness which requires a fresh hearing of this appeal, we remind the Appellant that if he wishes to rely on the videos he will need to serve them in good time in advance of the re-hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside for error of law and we direct that the appeal be remitted to the First-tier Tribunal de novo, for the consideration of any Judge except FTJ Freer.

Taimour Lay

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2024