Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03778/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Date Sent**
on 3 September 2013	**On 6 September 2013**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAZHARATH KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr N Ruddy, of Jain, Neil & Ruddy, Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is a citizen of Afghanistan whose date of birth is recorded as 1 January 1991. No anonymity order has been requested or made.

2) The respondent refused the appellant's asylum claim for reasons explained in a letter dated 5 April 2013. The respondent considered that the claim was not credible (paragraphs 16-32) but that even if taken at highest the appellant could relocate to Kabul (paragraphs 33-44) where there is legal sufficiency of protection (paragraphs 44-50).

3) First-tier Tribunal Judge Debra Clapham dismissed the appellant's appeal for reasons explained in her determination promulgated on 3 June 2013. The judge found the appellant's case not credible, and at paragraph 60 concluded that in any event he could relocate.

4) Mr Ruddy relied upon the grounds of appeal, which are extensive. Grounds 1-11 dispute the adverse credibility findings. Ground 12 argues that the appellant might be perceived as supporting the Afghanistan Government and international forces, and that the judge failed to consider the issue of humanitarian protection.

5) Submissions for respondent. Ground 1 does not disclose any self-contradiction by the judge. Although she made some findings in favour of the appellant, she correctly found that on other points he was inconsistent. At paragraph 53, the judge was entitled to find it not credible that if the appellant had a serious injury with pieces of a bomb or shrapnel inside his stomach, that could adequately have been treated application of cream or ointment at his sister's house. Although Ground 2 complains about issues of which the appellant did not have fair notice, it was established by HA and TD v SSHD [2010] CSIH 28 that the Tribunal was not under a general obligation to air its concerns about the evidence presented, particularly if there were obvious points and the appellant was represented. There was no need for medical expertise for a judge to come to such an obvious conclusion, nor was there any need to put the point to the appellant for further comment. Ground 3 criticises the judge's finding that it would not be logical for the authorities to suspect the appellant because of the incident, and that she was therefore unclear as to why he did not seek the help of the authorities. Mr Matthews said that the appellant might not like the view taken by the judge, but that amounted only to disagreement with a conclusion which was properly open to her. Ground 4 criticises the judge's view at paragraph 54 that the evidence left it unclear why the appellant travelled to his sister's house and not his own village, but that was only another disagreement on the facts, and the judge had explained why she had difficulties with the appellant's account. Mr Matthews submitted that the ground did nothing to explain these away. Ground 5 criticises the judge's conclusion at paragraph 55 that the claim that the village chief told the authorities the appellant was connected to the Taliban is speculative. The ground states that this overlooks the appellant's evidence that his sister overheard the village elder saying this to the police. Mr Matthews response was that even if the judge arguably overlooked that aspect of the evidence, it was at best a piece of second or third hand information and the same overall conclusions would have been reached. Ground 6 criticises the judge for founding upon documentation having come to hand only very recently, without adequate explanation of how and why it was conveyed through Pakistan. Mr Matthews said that the judge was entitled to conclude that there was no good

explanation why the documents were conveyed through a third party in another country and at a suspiciously late stage. Ground 7 makes only the same point as Ground 5. Ground 8 criticises the judge's finding at paragraph 57 that it lacks credibility that the authorities would not have found the appellant on searching his sister's house. The ground argues that this overlooks his account how he was concealed in the basement, under a rug which was under a bed. Mr Matthews submitted the judge was entitled to conclude that the authorities were likely to have searched with sufficient efficiency to find the appellant, without going into details of his alleged hiding place. Mr Matthew submitted that paragraph 9 of the grounds misrepresents the determination, because the judge concluded that the appellant's home had not been destroyed, a question of fact for her to decide in the context of her whole consideration of the evidence. Ground 10 was a further disagreement along the lines of Ground 6. Grounds and 11 and 12 did not come into play, as the other grounds were not made out.

6) Reply for appellant. Mr Ruddy agreed that Grounds 1 and 2 could be taken together as going to undermine paragraph 53 of the determination. This point was crucial, because the appellant had been consistent in his explanations. Given the extent of the favourable findings at the core of his account, a different overall decision could and should have been reached. The judge made a favourable finding on the appellant having gone to his sister's home after the explosion, but this important point was overlooked in the rest of the determination. While it might be thought obvious that a serious injury such as described was not treatable simply by cream or ointment, the appellant was entitled to a fair opportunity to explain how, in spite of such an injury, he could nevertheless have taken a taxi to his sister's house. This element should not have been taken to negate his account without giving a further opportunity to expand. The appellant had not said that he was unable to walk after his injury. The perception of the seriousness of an injury was subjective and a matter of degree. While Ground 3 did dispute a factual issue, the judge's description of the appellant's account as illogical went too far. If the judge accepted that two bombs went off and that there might be a fear of the authorities as a result, she had to do more to explain to the appellant why his overall account was not accepted. Mr Ruddy had nothing to add to Ground 4. As to Ground 5, directed at paragraph 55, the appellant's account of how he knew of the suspicion that he was linked to the Taliban was not speculative, but based on reliable information received from his sister. If the judge got this wrong, it was a point which made a significant difference and might have led to a different result. On Ground 6 there had been direct and detailed evidence of how the documents came into the hands of the appellant and were presented to the judge. It was a relatively simple explanation. It was not sufficient for the judge to say that she was at a loss on the matter. It was accepted that Ground 7 covered similar matters as Ground 5. As to Ground 8, attacking paragraph 57, it was accepted that the judge could reach an adverse conclusion, but the error was in the absence of any examination of the appellant's detailed and direct evidence of where and how he hid. As to Ground 10, the documents had been dismissed without examination of their terms, and significantly more would have been needed to justify that conclusion. It was accepted that Grounds 11 and 12 came into play only if the other grounds were made out.

7) I reserved my determination.

8) A judge is entitled to consider the case put to her without airing her concerns for further submissions, particularly where an appellant has been represented. I detect no unfairness. In any event, as made plain at paragraph 15 of HA and TD, procedural impropriety does not vitiate a decision if no prejudice has been suffered. The appellant has not indicated that he has anything further of significance to offer on the points of which he alleges lack of fair notice.

9) Apart from the fair notice issues, the Grounds are generally of a nature attacking the adequacy of the Judge's reasons for her overall adverse credibility finding. I was not referred to any authority on how alleged error of law of this nature ought to be tested.

10) On inadequacy of reasoning the dictum of Lord President Emslie in Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 at 348 may be taken as a starting point:

> The decision must, in short, leave the informed reader and the court in no real and substantial doubt as what the reasons for it were and what were the material considerations that were taken into account in reaching it.

11) The Court of Appeal in England and Wales gave general guidance in R (Iran) and Others v SSHD [2005] Imm AR 435 at 542. (The regulatory framework has since changed, but the principles remain the same.)

> 13. … Adjudicators were under an obligation to give reasons for their decisions (see reg 53 of the Immigration and Asylum Appeals (Procedure) Regulations 2003), so that a breach of that obligation may amount to an error of law. However, unjustified complaints by practitioners that are based on an alleged failure to give reasons, or adequate reasons, are seen far too often. The leading decisions of this court on this topic are now *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409. We will adapt what was said in those two cases for the purposes of illustrating the relationship between an adjudicator and the IAT. In the former Griffiths LJ said at p 122:
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> "[An adjudicator] should give his reasons in sufficient detail to show the [IAT] the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on [an adjudicator], in giving his reasons, to deal with every argument presented by [an advocate] in support of his case. It is sufficient if what he says shows the parties and, if need be, the [IAT], the basis on which he has acted, and if it be that the [adjudicator] has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, [the IAT] should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."
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> 14. In *English* Lord Phillips MR said at para 19:
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> "[I]f the appellate process is to work satisfactorily, the judgment must enable the [IAT] to understand why the [adjudicator] reached his decision. This does not mean that every factor which weighed with the [adjudicator] in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the [adjudicator]'s conclusion should be identified and

> the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the [adjudicator] to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

12) I also have regard to HA v SSHD [2007] CSIH 65, in particular paragraph 17:

> In the light of the cases cited to us it is convenient at this stage to formulate some propositions about the circumstances in which an immigration judge's decision on a matter of credibility or plausibility may be held to disclose an error of law. The credibility of an asylum-seeker's account is primarily a question of fact, and the determination of that question of fact has been entrusted by Parliament to the immigration judge (*Esen*, paragraph 21). This court may not interfere with the immigration judge's decision on a matter of credibility simply because on the evidence it would, if it had been the fact-finder, have come to a different conclusion (*Reid*, per Lord Clyde at 41H). But if the immigration judge's decision on credibility discloses an error of law falling within the range identified by Lord Clyde in the passage quoted above from *Reid*, that error is open to correction by this court. If a decision on credibility is one which depends for its validity on the acceptance of other contradictory facts or inference from such facts, it will be erroneous in point of law if the contradictory position is not supported by any, or sufficient, evidence, or is based on conjecture or speculation (*Wani*, paragraph 24, quoted with approval in *HK* at paragraph 30). A bare assertion of incredibility or implausibility may disclose error of law; an immigration judge must give reasons for his decisions on credibility and plausibility (*Esen*, paragraph 21). In reaching conclusions on credibility and plausibility an immigration judge may draw on his common sense and his ability, as a practical and informed person, to identify what is, and what is not, plausible (*Wani*, paragraph 24, page 883L, quoted with approval in *HK* at paragraph 30 and in *Esen* at paragraph 21). Credibility, however, is an issue to be handled with great care and sensitivity to cultural differences (*Esen*, paragraph 21), and reliance on inherent improbability may be dangerous or inappropriate where the conduct in question has taken place in a society whose culture and customs are very different from those in the United Kingdom (*HK* at paragraph 29). There will be cases where actions which may appear implausible if judged by domestic standards may not merit rejection on that ground when considered within the context of the asylum-seeker's social and cultural background (*Wani*, paragraph 24, page 883I, quoted with approval in *HK* at paragraph 30). An immigration judge's decision on credibility or implausibility may, we conclude, disclose an error of law if, on examination of the reasons given for his decision, it appears either that he has failed to take into account the relevant consideration that the probability of the asylum-seeker's narrative may be affected by its cultural context, or has failed to explain the part played in his decision by consideration of that context, or has based his conclusion on speculation or conjecture.

13) A distinction has to be drawn between those appeals which involve questions of law and those which are essentially argument about findings of fact, presented in some language of legal error. Fault should not be found by burrowing out areas of the evidence which have been dealt with less fully than others, and presenting that as a legal flaw.

14) The Grounds in this case do not amount to more than a series of factual disagreements.

15) Reading the FtT determination fairly and as a whole, it makes it clear enough to the appellant and any other reader why his evidence has not been found probative in its essential features.

16) I am also of the view that this was a case plainly defeated upon the alternative of internal relocation, an issue from which the appellant sought to shift the focus.

17) The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal shall stand.

5 September 2013
Judge of the Upper Tribunal