Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04128/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 17th April 2015	**On 23rd April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MALEK ELAHI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Cleghorn, Counsel, instructed by Paragon Law Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal E M M Smith promulgated following a hearing on 21st July 2014.

2. The Appellant is an Afghan citizen born 1st January 1995. His appeal against the Respondent's decision to refuse his claim for asylum and to remove him from the United Kingdom was heard by Judge Smith (the judge) on 21st July 2014 and dismissed. The judge heard evidence from the Appellant and his uncle Abdul Karim Allahie. The judge did not find the Appellant credible, and did not find that he would be at risk if returned to Afghanistan. The appeal was dismissed on all grounds, including Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

3. The Appellant applied for permission to appeal relying upon three grounds.

4. Firstly it was contended that the judge had failed to take into account or make any findings on the evidence of the Appellant's uncle who had given evidence at the hearing that corroborated the Appellant's account, in particular in relation to the Appellant's brother being killed. The judge only assessed his evidence in the context of the Appellant's Article 8 claim. Reliance was placed upon AK Turkey [2004] UKIAT 00230 at paragraphs 10 and 11.

5. The second ground contended that the judge had made flawed credibility findings, and the third ground contended that the judge had erred in considering Article 8 by failing to consider adequately the Appellant's private life in the United Kingdom and the length of time that he had been in the United Kingdom as a minor.

6. Permission to appeal was granted by Judge of the First-tier Tribunal Blandy who gave the following reasons for his decision;

> "The grounds of this application argue that the judge erred in law in failing to assess and make relevant findings in relation to the evidence of the Appellant's uncle, Abdul Karim Allahie. I do find this arguable. That evidence was clearly relevant in the context of its apparent corroboration of the Appellant's account, particularly having regard to the fact that the Appellant came to this country when he was still a child. It is right that the judge appears to make no mention of it. I also find it arguable that the judge failed to give adequate reasons for the credibility findings referred to in ground 2 of the grounds of this application and failed to give adequate reasons for his finding in relation to proportionality in relation to Article 8 ECHR. Permission to appeal is accordingly granted on all grounds."

7. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending in summary that the judge had not erred in law and had directed himself appropriately, and identified clear inconsistencies in the Appellant's account.

8. The Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

9. Ms Cleghorn relied upon the grounds contained within the application for permission to appeal and submitted that the first ground alone meant that the decision of the First-tier Tribunal was fatally flawed and must be set aside. This was on the basis that the judge had made no findings whatsoever on the evidence given by the Appellant's uncle, which supported the Appellant's evidence.

10. Ms Cleghorn submitted that in addition, errors of law were disclosed in that flawed credibility findings had been made, and in relation to the assessment of Article 8, for the reasons given in the grounds contained within the application for permission to appeal, read with the grant of permission.

11. Mr Smart relied upon the rule 24 response and accepted that the judge had made no findings in relation to the evidence of the Appellant's uncle. Mr Smart however argued that this was not material, and that it was difficult to see what weight should be placed upon the uncle's evidence, given that he had been granted refugee status in the United Kingdom, but his evidence was that he had returned to Afghanistan following the death of the Appellant's brother. Mr Smart submitted that the judge did not reject the claim that the Appellant's brother had died, but rejected the claim that he had been killed by the gang that kidnapped the Appellant.

12. Mr Smart argued that the credibility findings made by the judge were open to him to make, and the judge had carried out an adequate proportionality assessment when considering Article 8.

13. Ms Cleghorn indicated that if the decision was set aside, the appeal should be remitted to the First-tier Tribunal to be heard afresh as none of the credibility findings could stand. Mr Smart agreed that would be appropriate if an error of law was found to the effect that material evidence had not been considered, but not otherwise.

14. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

15. I conclude that the judge erred in law in not analysing and making findings upon the evidence of Abdul Karim Allahie. This witness had provided a witness statement dated 15th July 2004 and given oral evidence at the hearing.

16. It cannot be said that the evidence was irrelevant to the issues to be decided by the judge. In paragraph 9 of the witness statement the witness claimed that he had received a telephone call to say that the Appellant's

brother had been killed, and the witness then travelled to Afghanistan to support the Appellant's family. In paragraph 10 the witness expressed serious concerns, claiming that the Appellant's brother had been killed by the criminal gang that had targeted the Appellant's family and which had influence with the police. Evidence was also given that the Appellant could not seek protection from the police and that he would not be able to live safely or anonymously in a different part of Afghanistan.

17. If this evidence had been accepted as credible, the result of the appeal may have been different. The failure to analyse and make findings upon that evidence amounts to a material error of law. The judge did refer to the evidence given by the Appellant's uncle, but only in the context of Article 8 and made no assessment of the evidence so far as it related to risk on return to Afghanistan.

18. In my view this makes the credibility findings unsafe, and I conclude that the grounds on this issue, do more than demonstrate a disagreement with the findings made by the judge, and disclose a material error of law.

19. In relation to Article 8 the Appellant had a private life claim and this was set out in the skeleton argument. It was contended that he had established a private life in the United Kingdom, and that it was relevant that this had been developed between the ages of 13 and 19, he having arrived in this country as a minor. Consideration of Article 8 by the judge considered the family life claim in the main with a passing reference to private life in paragraph 43, and a finding in paragraph 47 that the Respondent's interference with the Appellant's family and private life is proportionate. The Upper Tribunal in Budhathoki [2014] UKUT 00341 (IAC) confirms that judges do not need to rehearse every detail or issue raised in a case, but must identify and resolve any conflicts in the evidence, and explain in clear and brief terms their reasons, so that the parties can understand why they won or lost. In relation to Article 8 I find that there is an inadequacy of reasoning and therefore the decision needs to be re-made on this issue.

20. Therefore the decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

21. In deciding whether to remit the appeal to the First-tier Tribunal I have taken into account paragraphs 7.2 and 7.3 of the Senior President's Practice Statements which are set out below;

> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make a decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding is necessary.

22. In my view, because the appeal is to be considered afresh, extensive fact-finding is required, and it is appropriate for this to be undertaken by the First-tier Tribunal rather than the Upper Tribunal. The error of law that I found amounted to a failure to make findings upon material evidence, and both representatives agreed that if that were the case, it would be appropriate to remit the appeal back to the First-tier Tribunal.

23. The appeal will be heard by a First-tier Tribunal Judge, other than Judge Smith, at Bennett House, Stoke-on-Trent and the parties will be given written notification of the hearing date.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the First-tier Tribunal.

Anonymity

There was no order for anonymity made in the First-tier Tribunal. There has been no request to the Upper Tribunal for an anonymity order, and in the absence of such a request the Upper Tribunal makes no anonymity order.

Signed Date 20th April 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

Any fee award is to be decided by the First-tier Tribunal.

Signed Date 20th April 2015

Deputy Upper Tribunal Judge M A Hall