



IAC-FH-AR-V2

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07137/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 August 2015
Prepared 3 August 2015

Decision & Reasons Promulgated
On 24 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GHAIRATULLAH DAWLATZAI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Mr S Saeed, Counsel, instructed by Aman Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant, a national of Afghanistan, date of birth 1 January 1994, appealed against the Secretary of State's decision, dated 4 September 2014, to refuse to vary

leave to remain and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The appeal against that decision came before First-tier Tribunal Judge Callender-Smith (the judge) who, on 3 March 2015, allowed the appeal under the Refugee Convention and Articles 2 and 3 and separately Article 8 of the ECHR.
4. Permission to appeal that decision was given to the Secretary of State by First-tier Tribunal Judge V A Osborne on 18 March 2015.
5. At the hearing on 3 August 2015 Mr Walker on behalf of the Secretary of State applied to amend the grounds of appeal in order to raise an error of law and fact in that the judge accepted that the Appellant's claim that he did not have an Afghan passport and that were he to apply for one he would face the real risk of ill-treatment on return to Afghanistan. Yet as a fact the Appellant did have a current passport (0A436032 issued in London 08/02/2011 valid to 2016) (AB page B19). Mr Saeed opposed the application on the basis that the application was too late and ultimately made no difference to the outcome. I decided to allow the amendment to the grounds because the Appellant's credibility was at the heart of the judge's assessment of risk and events on return to Afghanistan. Mr Walker also argued that the credibility issue and assessment affected the judge's findings on Article 8 ECHR issues. I decided to permit the amendment on the basis that it arose from the judge's findings and the person drafting the grounds reliant upon the Decision alone would not have appreciated the fact the Appellant had a current Afghan passport.
6. The fact that the Appellant had a new afghan passport was not brought to the judge's attention by the Appellant's representative. The omission was not picked up by the judge who had "also read the Appellant's bundle" (Decision paragraph 19) and "... read and considered all the papers before me ..." (Decision paragraph 20): It does not seem he could have done so.
7. Rather the judge proceeded on the basis of the Appellant's written (Statement dated 3 November 2014 paragraph 23 AB page B5) and oral evidence (Decision paragraph 21(d)), as reported in the decision, finding that the Appellant did not have an Afghan passport (Decision paragraph 21(d) and paragraph 28(c) and (e)). At the hearing on the 18 February 2015 the judge's record of proceedings showed the Appellant adopted his witness statement without correction and told the judge that he did not have a passport or visa when he attended the Harrow Registry Office on 30 January 2015. Yet the Appellant had already obtained his passport and an Immigration status document providing DLR on 25 November 2010 which may have been extended if the Appellant was, as the judge found, lawfully in the UK (Decision paragraph 28 (q)).
8. Thus the judge accepted the Refugee Convention claim and Articles 2&3 ECHR claims because to obtain evidence of his nationality (NIC or passport) e.g. reveal information about himself, his place of birth, details of his parents and possibly uncles and grandfather but that he did not know such information. In those

circumstances the judge accepted Afghan officials would doubt the Appellant's identity and on a return to Afghanistan arrest him for being a suspected supporter of the Taliban or the Appellant '... may become the target of fatal attention by the Taliban' (Decision paragraph 28(e)).

9. The passport contained the Appellant's date of birth as 1 January 1994, his place of birth Kundoz in Afghanistan. Kundoz province as the home area was identified in both the Appellant's statement (B page1 paragraph1) and personal statement (B page 4 paragraph4). I have no reason to doubt, the passport photograph was of the Appellant. A similar picture of the Appellant appeared in his Residence Permit issued in 2010 and valid to July 2011. An application to extend Discretionary Leave to Remain was made on 27 June 2011 but was not refused until the Secretary of State's decision of 4 September 2014 (RFRL paragraphs 12, 17 & 76).
10. It simply could not be argued that if the Appellant managed to obtain an Afghan passport in 2011 that he could not provide the necessary particulars to obtain a valid passport. There was nothing to indicate that the value attributed to a passport issued by the Afghan government is anything less than that by other states and the importance of a passport as evidence of identity can not be under-estimated.
11. In these circumstances I have considered whether or not the judge's omission to address the evidence, might give rise to a different outcome in considering the merits of the appeal, not only the assessment of risk under the Refugee Convention of the Appellant being persecuted but also, in relation to proscribed ill-treatment contrary to Articles 2 and 3 of the ECHR.
12. Having considered that matter in the light of the case of **R (Iran)** [2005] EWCA Civ 982 it seemed to me that there was a material omission which could well lead to a different outcome in the appeal in terms of the assessment of risk on return. It is clear that other findings of fact were driven by the judge's conclusion that he found the Appellant a cogent and credible witness for the judge was struck by the Appellant as "an unusually straightforward and honourable young man".
13. The assessment may in other respects be correct, for I express no view upon it, but it seemed to me that the assessment of credibility was likely to be affected by the passport error. Whilst it cannot be said with certainty that the different result would arise, it certainly was the case that the judge made that assessment skewed by a lack of consideration of the relevant evidence and as such made an error of fact and an error of law. I conclude the judge's findings on the Refugee Convention and Article 2&3 ECHR claims disclose errors of law. The Original Tribunal decisions can not stand.
14. The judge did not consider the Secretary of State's decisions on Appendix FM nor Paragraph 276ADE of the immigration rules. The judge's explanation of the outcome of the Article 8 claim was, to put it mildly, so terse as to be inadequate. Whilst finding the Appellant's family life rights under Article 8 were engaged he gives no reasons. He did not address the Appellant's private life rights. The Judge's

consideration of **Razgar** [2004] UKHL 27 and **Huang** [2007] UKHL 11 lacks reasons. How the Appellant with a fiancée of c. 2 ½ years, with whom he does not live, enjoy family life was not explained by the judge. The Appellant's fiancée Ms Naqshbandi statement gave no material insight into their family life nor does the judge's decision (paragraphs 22-25, 28 (f)-(j)). Quite simply there were no adequate reasons for the Article 8 finding nor any balanced assessment of proportionality. The judge treats Section 117B NIAA 2002 as if it is a criteria approach to assessing proportionality.

15. I am satisfied that there has been an error of law in relation Article 8 ECHR assessment not least with reference to the credibility of the Appellant and the public interest.

NOTICE OF DECISION

16. Accordingly I am satisfied that the Original Tribunal's decision cannot stand and the decision will have to be remade. No anonymity order was sought.

Directions

- (1) To be heard at Taylor House in the First Tier Tribunal .Not before F-t T judges Callender Smith or T Davey.
- (2) Relist for 3 hours
- (3) Pashtu interpreter required
- (4) Matters for consideration: Refugee Convention Article 2, 3 and 8 of the ECHR and Humanitarian Protection claims and under the immigration rules
- (5) Any further documents relating to the claims including any additional statements to be served on the IAC Taylor House and respective parties not less than 10 working days before the further hearing.

Signed

Date: 12 August 2015

Deputy Upper Tribunal Judge Davey