



IAC-TH-WYL-V2

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

Appeal Number: AA/08728/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 19 November 2015**

**Decision & Reasons Promulgated
On 30 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**KJ
(ANONYMITY DIRECTION CONTINUED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Kiai of Counsel

For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on 1 January 1988. He appealed against the respondent's decision to refuse asylum, humanitarian protection and on human rights grounds dated 16 October 2014.
2. In a decision promulgated on 18 August 2014 Judge Andrew (the judge) dismissed the appeal. She did not find the appellant to be a credible

witness regarding events in Afghanistan or that he would be at risk on return.

3. The grounds claimed a procedural impropriety on the part of the judge, in particular, failure to give the appellant proper opportunity to address evidence. At [17] of her decision, the judge found the appellant was not a member of the Afghan National Army as he claimed. The judge placed little weight upon the background material which she referred to at [18] of her decision, given it was from a more recent time than when the appellant claimed to have served in 2007. The judge went on to conduct her own research. She referred to the COIS Report at [19] of her decision which was not produced or referred to at the hearing.
4. The grounds claimed the judge asked the appellant at the hearing whether he was in the army or the police and he replied the former. The judge did not then pursue that answer with further questions to challenge the appellant as to any concerns that the army might not be responsible for border control as she found at [20]. The judge noted on more than one occasion within the decision that the appellant was of borderline intelligence and illiterate. In that regard she took into account the expert evidence of Dr Egnal. In such circumstances it was all the more important that the appellant be asked directly if the judge had concerns which the grounds claimed she clearly had, as she carried out further research on the point post-hearing.
5. Following the decision, an expert on Afghanistan, Dr Giustozzi was approached for his specific comments on the issue. Attached to the grounds was a letter from Dr Giustozzi to Wilson Solicitors LLP dated 28 August 2015. The grounds claimed that letter supported the proposition that it appeared more likely from the appellant's account that he had served in the border police but given the militarised nature of the police, it was plausible that the appellant was confused given his illiteracy and relatively low IQ. Therefore the judge's finding at [20] that the appellant was aware of the difference between the police and the army was unsafe, as the situation was more nuanced than that. Further, that the negative finding with regard to the appellant's status in the army might well have infected the judge's other credibility findings, his occupation being so central to his background and the claim.
6. Judge Fisher granted permission to appeal on 11 September 2015. Judge Fisher found there was no merit in the grounds regarding the additional comments from Dr Giustozzi. The judge had to determine the appeal on the evidence which was before her and the post-decision production of further evidence could not amount to an error of law in the original reasoning. However, Judge Fisher found it was arguably unfair to make adverse credibility findings on evidence which was not put to the appellant, especially as he had clear intellectual difficulties such that permission to appeal was granted.

7. The Rule 24 response from the respondent was dated 29 September 2015. As regards the COIS Report, the respondent submitted she could not concede any error or provide a specific response to that ground without the benefit of access to the Record of Proceedings, to identify what evidence was before the judge. Nevertheless, given that the appellant's subjective evidence was not consistent with the objective evidence before the judge and given that the COIS Report was dated 2008 and had been in the public domain for many years and was the accepted medium of objective evidence relied upon in asylum appeals, it was difficult to see how the judge's reference and reliance on that evidence could amount to a material arguable error of law.

Submission on Error of Law

8. Ms Kiai handed up a witness statement of Mark Bradshaw of Counsel dated 18 November 2015. Mr Bradshaw was Counsel at the substantive hearing before the judge and drafted the grounds. Ms Kiai also handed up a printout from the website of Duncan Lewis with regard to them obtaining an "*... unprecedented generic injunction from the Court of Appeal in relation to removals to Afghanistan*" together with a copy of the order of the Court of Appeal dated 24 August 2015 in the case of **HN (Afghanistan)** (C2/2015/2582).
9. Ms Kiai relied upon the grounds. There was a procedural impropriety on the part of the judge in carrying out her own research from documentation which had not been before her. See in that regard [2] of the statement of Mark Bradshaw. Further, it was arguable that the judge compounded her error which infected the evidence of the appellant's brother. At [22] of her decision, in referring to the COIS, she commented, "*It follows from this that I am unable to be satisfied that the appellant's brother A was kidnapped and that if he was, it was anything at all to do with the appellant*".
10. Ms Brocklesby-Weller relied upon the Rule 24 response. She conceded that the judge had erred, however, she submitted the error was not material. The COIS Report dated 2008 had been in the public domain for many years and was the accepted medium of objective evidence commonly relied upon in asylum appeals. It was difficult to see how the judge's reliance on that evidence could be material such that the decision ought to be set aside.

Conclusion on Error of Law

11. I do find the judge erred in her approach to the evidence and I also find the error was material. That was because the judge referred to the 2008 COIS Report on Afghanistan within her decision, a document that had not been filed by either party nor referred to by either advocate. At [19] of her decision, she quoted from [9.22] of the COIS Report describing the Afghan Border Police, its functions, responsibilities and organisation. Relying upon that background material, the judge went on to analyse the

appellant's evidence and made a finding as a result that he was not credible.

12. I find there was a procedural impropriety in the manner in which the judge approached that background material. No issues arising from that material had been put to the appellant who was in any event of borderline intelligence and illiterate. I find that given he was a vulnerable person, there was all the more reason for the judge's concerns which she set out at [20] to be put to him.
13. I also find that the judge's error I have set out above infected her other credibility findings with regard to A, the appellant's brother. The judge was clear at [22] that following on from her adverse credibility findings at [20] - [21] she found A not to be credible.
14. I find the judge erred in law for the reasons I have set out above. I set aside the judge's decision.

Decision

15. The judge's decision is set aside and will be re-made following a *de novo* hearing. Directions are attached to this short decision.

Anonymity direction continued.

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 19 November 2015

Deputy Upper Tribunal Judge Peart



IAC-BH-PMP-V1

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For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DIRECTIONS

1. Remit to the First-tier Tribunal for a de novo hearing.
2. List first available date. Time estimate four hours.
3. Not later than ten working days prior to the hearing, the parties must file with the First-tier Tribunal and serve upon each other, all documentary evidence (including witness statements) upon which they intend to rely, as well as any skeleton arguments.

Signed

Date 19th November 2015

Deputy Upper Tribunal Judge Peart