IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08627/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 31st March 2016	**On 13th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

FARIDEH HASSANI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss A Bhachu, instructed by Messrs J M Wilson
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Afghanistan whose claim for asylum in this country had been refused by the Secretary of State. The core of the her claim was that she was at real risk if returned to Afghanistan as her daughter had worked for the Ministry of Women's Affairs in Afghanistan, as a result of which the daughter had been threatened as had other members of the family and in time the daughter was killed by the Taliban and the rest of the family fled in fear. The Secretary of State did not accept that the daughter had been killed, that the Appellant was wanted by the Taliban or that she would be at risk in Afghanistan if returned.

2. Her appeal against the refusal of asylum and removal decision was heard before Judge of the First-tier Tribunal J Pacey and dismissed in a decision promulgated on 19th October 2015. The Appellant applied for permission to appeal to this Tribunal. In brief the Grounds of Appeal were that the judge had applied the wrong standard of proof as at paragraph 84 of her decision she had referred to "the lower level of the balance of probabilities", which was the wrong standard. She had also failed, it was said, to give any reasons as to why she had not accepted as reliable a letter confirming the circumstances of the daughter's death which appeared on government letterhead written on behalf of elders of the village and verified by the provincial council. The original letter and envelope had been produced at the hearing but the judge had failed to make any finding as to why no weight was attached to that evidence. Reference was made to the reported decision in **MK (Duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)**. Permission to appeal was granted on both grounds. In a response under Upper Tribunal Procedure Rule 24 the Secretary of State indicated that the appeal was opposed and submitted that the judge had given adequate reasons for her findings. It was argued that she had directed herself correctly as to the standard of proof at paragraph 5 of her decision. As to the reference at paragraph 54 it was stated that when the judge said "even on the lower level of the balance of probabilities" she had meant lower than the balance of probabilities, which would be a reasonable degree of likelihood.

3. At the commencement of the hearing before me Mr Mills confirmed that the appeal was opposed. Miss Bhachu relied upon the grounds and handed in copies of authorities relating to the correct standard of proof in asylum appeals namely **Mohammed Imran Ali v SSHD 19298**, a decision of the Immigration Appeal Tribunal from 1999 and **Santhirakumar v SSHD [2002] UKIAT 01583**. Both these decisions are of some antiquity but there was no objection to their being handed in and relied upon. Miss Bhachu said that what was stated in the response under Rule 24 was speculative and simply suggested a different interpretation but it was not what the judge had stated at paragraph 84 of her decision. It was axiomatic that the correct standard must be applied and the judge had referred to the balance of probabilities, which was incorrect. In the case of **Ali** the judge there had at one point identified the correct standard of proof but later a conflicting standard had been used. That too had been a political asylum case and the Tribunal had overturned the decision.

Whilst the judge had stated the correct standard at paragraph 5 she had subsequently applied a different standard.

4. With regard to the letter from the villagers the judge had referred to that in the evidence and the original envelope and original letter had been produced at the hearing. The villagers stated that they were witnesses to the killing of the daughter but the judge had made no findings whatever on that document, although she commented that no death certificate as such had been obtained. It was clear from **MK** that a Tribunal must give reasons as to why no weight or little weight has been given to a document or to evidence but the judge made no findings at all in respect of that document. She had made no finding as to whether the daughter was alive or dead and the Appellant was entitled to know why she had won or lost. The letter in question had been confirmed by the authorities including the police and village council.

5. In response Mr Mills said that the standard of proof was mentioned on only two occasions, at paragraphs 5 and 84 and that at no point other than in paragraph 84 was there any hint of the incorrect standard being used. He said the judge in question was experienced and she should be given the benefit of the doubt. The response under Rule 24 went one step further. Paragraph 5 set out the correct standard. What the judge had written at paragraph 84 in fact made no sense and it would be unfair to think that the judge had applied the wrong standard. It was true that the judge had failed to refer to the document from the villagers but he submitted there was no ambiguity in the view of the judge upon the Appellant's evidence. Most of the adverse credibility findings had nothing to do with corroboration. It was difficult to see that if the judge had expressly addressed the document it could have made any difference. He went on to suggest that at paragraphs 81 and 82 it could be considered that the judge had addressed the issue. At paragraph 81 the judge stated that persons who could have confirmed the death had not done so and at 82 that there was no death certificate and the judge questioned why the villagers who were stated to be helpful had not obtained one. The Appellant had failed to answer that question. There, he said, the judge was addressing the lack of proper corroboration. He submitted that within that finding it could be taken that the judge had rejected the letter from the villagers but in the round it could make no difference. It was clear why the Appellant had lost.

6. Finally Miss Bhachu said that the document in question was significant evidence. At paragraphs 80 and 81 the judge was saying there was no corroborative evidence but there had been corroborative evidence in the form of the letter which was stamped and verified by the police. That could well have made a material difference had it been considered. The judge was saying that there was no supportive evidence but there was. What the judge had done fell far short of the standard required in **MK** as she had not even rejected the letter. As to the standard of proof there might be ambiguity but it was not clear that the judge had applied the

correct standard. If the benefit of the doubt was to be given to anyone it should be to the Appellant not to the judge.

7. Having heard those submissions I reserved my decision which I now give. As to the standard of proof it is the case that at paragraph 5 of her decision the judge set out a perfectly appropriate summary of the correct standard referring to "a reasonable likelihood" or "a serious possibility" and stating that this was a lower standard than the balance of probabilities. However paragraph 84 reads as follows:

> "If the agent merely promised to get them to a safe place, as the Appellant argues, then it is reasonable to suppose that he would have considered his function fulfilled when they arrived in Belgium. She had told him that she had a daughter in the UK and to my mind, even on the lower level of the balance of probabilities, her intention was not to seek asylum in the first safe country, on the basis of a well-founded fear of persecution, but to reach the UK, where she has a daughter."

8. As Mr Mills submitted it is the case that the judge gave various reasons for rejecting the Appellant's account but the application of the correct standard of proof in reaching those findings is critical. To my mind the phrase "even on the lower level of the balance of probabilities" could have several interpretations. The judge may have intended, as was suggested in the Rule 24 response, that she was applying a standard lower than the balance of probabilities but that is not what she set out in the decision. The phrase however is also capable of an interpretation that she had previously applied a higher standard but even on a lower level i.e. the balance of probabilities the Appellant's intention was not to seek asylum. Such ambiguity does undermine the reliability of the findings and amount to an error of law potentially material to the outcome.

9. With regard to the letters from the villagers it is the case that the judge described this in terms at paragraph 49 of her decision. At paragraph 33 it was also mentioned and stated that the Appellant produced the original letter and envelope at the hearing. There is no subsequent consideration of the letter however. It is the case that at paragraphs 81 and 82 the judge commented on a lack of information from the Ministry of Women's Affairs and that there was no death certificate as such for the daughter but she made no reference to what weight if any she placed upon the letter from the villagers which was said to have been endorsed by the authorities. The headnote to **MK (Duty to give reasons) Pakistan** reads as follows:

> "(1) It is axiomatic that a determination discloses clearly the reasons for a Tribunal's decision.
>
> (2) If a Tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to

be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

10. It is the case that the judge made no assessment of the worth of the document from the villagers. That failed to meet the requirement to give reasons as expressed in **MK**. It was also the case that it was not apparent that the evidence had been considered in the round, a duty that has been made clear in numerous cases including in particular **Mibanga v SSHD [2005] EWCA Civ 367**. The errors of law identified were potentially material to the outcome and I therefore set aside the decision of the First-tier Tribunal. I had canvassed with the representatives the appropriate course if the decision was set aside and it was clear that the appeal would have to be remitted to the First-tier Tribunal for rehearing, no findings being preserved, in accordance with Statement 7.2(b) of the Practice Statements for the Immigration and Asylum Chamber of the Upper Tribunal and under the provisions of Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Notice of Decision

The making of the decision by the First-tier Tribunal involved errors on points of law and that decision is set aside. The appeal is remitted to the First-tier Tribunal for rehearing, no findings being preserved, in accordance with the directions below.

No anonymity order was requested and none is made.

Signed Date 7 April 2016

Deputy Upper Tribunal Judge French

DIRECTION FOR REHEARING (SECTIONS 12(3)(A) AND 12(3)(B) OF THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

1. The findings of the First-tier Tribunal are set aside and the appeal is to be heard afresh, no findings being preserved.

2. The members of the First-tier Tribunal who are to reconsider the appeal should not include Judges of the First-tier Tribunal J Pacey or J M Reid.

3. The appropriate hearing centre is Birmingham and the time estimate three hours. A Dari interpreter will be required.

4. Each party shall serve upon the other party and upon the First-tier Tribunal copies of any witness statements or other documents upon which reliance is intended to be placed at least seven days before the hearing.

Signed Date 7 April 2016

Deputy Upper Tribunal Judge French