Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02805/2018

THE IMMIGRATION ACTS

Heard at the Civil Justice Centre, Manchester
On 26th November 2018

Decision & Reasons Promulgated
On 2nd January 2019

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR W.K.
(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer (Counsel)
For the Respondent: Mr Tan (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Parker promulgated on the 13th April 2018, in which he dismissed the Appellant's protection and Human Rights claims.

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2. Permission to appeal has been granted by Upper Tribunal Judge Pitt on the 18th September 2018 who found that it was arguable that First-tier Tribunal Judge Miah had taken an incorrect approach where the Appellant's evidence was that he did not know if other Army officers identified in the photographs on the internet had been threatened because he had not been in touch with them, rather than the evidence being that there had been no threats to them and that further the grounds concerning the likelihood of the Taliban phoning and writing to the Appellant were also arguable in light of the country material and it apparently being accepted that the Appellant's photograph identifying him as an Army officer who had trained in the UK was on the internet. She found that all the grounds were arguable.

3. In his oral submissions Mr Greer relied upon the written Grounds of Appeal, both the original ones and those renewed before the Upper Tribunal, which I have taken account of, and submitted that there are three grounds upon which permission had effectively been granted. Firstly he dealt with plausibility; the second was a failure to resolve a dispute regarding the online publication with photographs shown of the Appellant's attendance at Sandhurst; and the third he argued related to even if there was no past threat, whether or not the Appellant's profile would put him at risk upon return nevertheless, which he argued the Judge had not properly dealt with.

4. Mr Greer argued it was agreed as a matter of fact that the Appellant was a Major and therefore a commissioned officer within the Afghan Army who had been invited to attend a training course at Sandhurst around Remembrance Day 2016. He said that the refusal letter had been ambivalent regarding whether or not the picture of the Appellant had been put on Facebook by himself or if the Taliban became aware of it or had threatened him, but he said there were two key pieces of evidence before the Tribunal, firstly the "night letter" referred to at page 8 of the Appellant's bundle with the translation at page 9, secondly a "screen grab" of a Facebook post at page 12 of the Appellant's bundle. Mr Greer argued that Judge Parker had not given adequate reasons for discounting the plausibility of the Appellant's claim and said at paragraph 23 of the decision the Judge had found that it

was not plausible that the Appellant would simply be threatened when the Taliban had it in their means simply to kill him.

5. He argued that the evidence before the Tribunal was that the Taliban did issue night letters and threaten people which was mentioned within the Home Office guidance on Afghanistan version 2 which was handed up on the morning of the Tribunal hearing before the First-tier Tribunal at paragraph 4.3.1, and that in addition, there was reference within the UNHCR guidelines referred at page 46 of the Appellant's bundle before the First-tier Tribunal referring to the Taliban using threats, intimidation and abductions. Mr Greer said that he took the First-tier Tribunal Judge to those parts of the evidence. In respect of that it was further argued by Mr Greer that the Judge's findings as to whether or not the photograph had been put on Facebook were unclear. He argued that if the article had been put on Facebook and was there to be seen by a Taliban, then that was an issue that had to be determined by the First-tier Tribunal Judge which had not been determined.

6. In respect of the third ground he argued that even if the Appellant had not been telling the truth in the past, which was disputed, it was argued that he would still be at risk in the future and the Judge had not adequately considered the future risk for someone who is returning from the west after a lengthy absence, who had left the Army by the date of the hearing and who had links to the west having been invited to a seminar in the UK by the British Army. He said that the Judge's finding at paragraph 50 that the Appellant simply being a Major in the Army would not be enough to put him at risk was insufficient as a finding, and his profile needed greater consideration and that the Judge failed to take account of all the factors which are said to give rise to risk. He argued that the Judge's attention had been drawn to the Board of Canada report from August 2017 at page 23 of the bundle where at paragraph 3 it said that it may not simply be enough to change jobs and that someone in the Appellant's position would need to change sides and that there was evidence of how high ranking officers would be at risk on page 24, paragraph 3 and how there was no protection for former Army members at paragraph 5 on page 25 of the bundle.

7. In his response Mr Tan conceded that the Judge was wrong to state that it was implausible that the Taliban would use threats and warning letters as stated by the Judge at paragraph 23 of the decision and that it was clear from the objective evidence that the Taliban did use threats and warning letters. However, he argued that although that was an error, it was not material, as the Judge had found the Appellant's family had been able to live violence free since 10 February 2017 and that if the Appellant was at risk they would have also come to harm and that further the Appellant had waited two weeks before leaving, without having been harmed at paragraph 23 of the decision. He submitted that the Judge had properly considered the risk, and that the findings were sustainable.

8. Mr Tan further conceded that it was not clear from the Judge's findings as to whether the Judge found that the photograph had been put on Facebook or not, but had then argued that the ultimate question in that regard was whether or not the Appellant was at risk, which he argued the Judge had dealt with. He therefore conceded that this was an error, but argued that it was not material.

9. In respect of the final ground, Mr Tan argued that the Judge had dealt with the question of internal relocation of the Appellant's profile and that the background evidence was that low level people could relocate. He conceded that it was not the most comprehensive consideration of the risks to the Appellant but argued that it was not material.

10. In response, Mr Greer reminded me that pursuant to the case of SH (Afghanistan) [2011] EWCA Civ 1284, at paragraph 15, it was stated that for an error to be immaterial it had to be inevitable that at first the Tribunal would have reached the same decision irrespective and that that could not be said, he argued, in respect of these errors which he argued changed the whole decision. He argued that it was not a case that the Appellant's family were able to live risk free, but the Appellant in his statement had said that his family were living in hiding through fear.

11. Both legal representatives agreed that it was a material error and the case should be remitted back to the First-tier Tribunal for reconsideration.

My Findings on Error of Law and Materiality

12. It was conceded by Mr Tan on behalf of the Secretary of State that the First-tier Tribunal Judge did err at [23] in stating that it was "incongruous that the Taliban would make threatening phone calls and issue warning letters" and that "it would be easier to simply kill the Appellant without warning. By making phone calls and issuing letters it has given the Appellant time to flee which does not seem to make sense".

13. The background evidence both in terms of the country policy and information note on Afghanistan from December 2016 at paragraph 4.3.1 specifically stated that the Taliban do use night letters which are threatening letters. Further, within the UNHCR guidelines referred to within the Appellant's bundle to which the Judge's attention I am told was drawn by Mr Greer, there is specific reference at page 46 of the Appellant's bundle, to the utilisation of threats, intimidation and abductions. The Judge has therefore failed to take account of relevant evidence in finding that it is incongruous that the Taliban would make threatening phone calls and issue warning letters rather than simply killing the Appellant. The background evidence clearly makes reference to the Taliban wishing to intimidate their victims, and utilisation of threats in an attempt to do so. The Judge therefore has failed to take account of relevant evidence in that regard.

14. Although it is argued by Mr Tan that that error, although admitted to be an error, is not material given that the Judge found the Appellant's family had lived violence free in Kabul since February 2017 and that the Appellant had been able to wait two weeks before leaving in circumstances where the

Taliban knew of his address, as found by the Judge, given that the findings and risk to the Appellant has to be considered taking account of all of the evidence, I cannot say that the Judge would necessarily have reached the same decision had he taken account of the fact that the Taliban do use warning letters and make threatening phone calls. It was the Appellant's clear case that he had been threatened by the Taliban and that he had received a threatening letter in February 2017. I therefore find that this error is a material error.

15. It is further clear that although the Judge at [25] did find that the Appellant posting pictures on Facebook seemed a reckless and foolish thing to do, the Judge has not in fact made findings as to whether or not the Appellant did make the posting on Facebook which can be seen at page 12 of the Appellant's bundle. No clear findings have been made by the Judge as to whether or not that posting was in fact made by the Appellant and what the effect if he had posted it was or as to whether or not it would be likely to come to the attention of the Taliban. The Judge therefore had failed to resolve an issue in dispute between the parties in that regard. Further, although the Judge at [30] said that the pictures on Facebook showed two high ranking officers who have not been targeted which he considered to be very strange given the Appellant's story, in fact the Appellant's evidence in that regard was that he did not know whether or not the other officers had been targeted as he had had no contact with them since, rather than the fact as depicted by the Judge, at the fact that they had not been targeted. The Judge therefore appears to have misinterpreted the Appellant's evidence in that regard.

16. The core element of the Appellant's account is that he is at risk having received the threatening letter having made the postings on Facebook and it showing him having attended at Sandhurst, which although the Judge considered may have been a reckless and foolish thing to do, the Appellant's account was that he had done it because he was proud of having been invited to attend at a training event at Sandhurst and wanted to show his friends and family.

17. I find that the Judge's assessment of the Facebook evidence, and his failure to actually resolve the issue as to whether or not there was a Facebook posting made, does amount to a material error. It was core to the Appellant's account and I cannot say that the Judge's decision would necessarily have been the same, had that finding not been made.

18. In respect of the third ground of appeal, the findings of the Judge were open to him on the evidence, and the Judge has referred to the background evidence in that regard at [50].

19. However, given the material errors made by the Judge in respect of the Facebook postings and the threatening letter, I do find that the decision of First-tier Tribunal Judge Parker should be set aside in its entirety and the case remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge A.J. Parker.

Notice of Decision

The decision of First-tier Tribunal Judge A.J. Parker does contain a material error of law and is set aside.

The case to be remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge A.J. Parker.

I do make an anonymity direction in this case given the nature of the protection claim made by the Appellant. No record or transcript or other note of these proceedings may identify the Appellant or members of his family either directly or indirectly. Failure to comply with this direction applies both to the Appellant and to the Respondent. Failure to comply with this direction may lead to contempt of Court proceedings.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty		Dated 26th November 2018