Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05666/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2018	**On 24 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

M.A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Gayle, of Counsel, instructed by Elder Rahimi Solicitors
For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

ERROR OF LAW

Introduction

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Housego ("the judge"), promulgated on 21 June 2018, in which he dismissed the appeal on all grounds. That appeal arose

from the Respondent's decision of 16 April 2018, refusing a protection and human rights claim made by the Appellant on the basis that he is wanted by the authorities for his support of relatives who are of the Ba'hai faith.

The Judge's Decision

2. The judge heard evidence from the Appellant. He set out in detail the evidence and submissions at [22] to [28] and findings at [29] to [53]. While the judge noted that the Appellant's written testimony was clear, coherent and plausible and identified other positive factors that fell in his favour, he set out several "negative factors" that counted against him at [37]. Consideration was given to the reliability of the documentary evidence, inconsistencies in the account, the provenance of evidence from an Iranian lawyer, omissions in the evidence and the absence of documentary evidence that should have been readily available. At [43] the judge identified "major difficulties" with credibility and set these out as follows:

"43.1. The evidence about the shop being sealed, and the lack of evidence of a notice from the authorities sealing the shop.

43.2 The lack of any correspondence between the Iranian lawyer and the UK solicitor.

43.3 The tendering as probative evidence of blank documents from the UK solicitor's office as if they are from the Iranian lawyer, when they are blank printouts from the UK solicitor's email account, of things forwarded to it, which are notoriously unreliable.

43.4 The absence of any WhatsApp or Telegram call or document history about critical conversations and messages.

43.5 The evidence of the appellant in the hearing about a raid on his home (which was very damaging to the credibility of the appellant given the detail in the witness statement, and the assertion that the interview had been inadequate so that effort had to be made to put the case fully subsequently)."

The grounds of application and grant of permission

3. The grounds of application take issue with the judge's assessment of credibility and the challenge secured the Appellant a grant of permission by the First-tier Tribunal on 1 August 2018.

4. The Respondent did not file a Rule 24 response, but Miss Isherwood resisted the appeal.

Decision on Error of Law

5. I have considered the helpful submissions made by both representatives. While Miss Isherwood made a valiant attempt to defend the judge's decision, I have reached the conclusion that in an

otherwise focused decision the judge did err for essentially two reasons.

6. The evidence in any appeal must be assessed in the round. I fully appreciate that the judge has stated that this is what he did, however, errors were made in the approach he adopted in the consideration of evidence in relation to an email from an Iranian lawyer to the Appellant's solicitors and the Appellant's written and oral testimony.

7. First, it was the Appellant's case that he had been summoned to face charges in the Revolutionary Court of Iran. It was claimed that information relating to those charges was provided to the Appellant by his lawyer in Iran. The evidence comprised of a letter from the lawyer to the Appellant and a further letter confirming the basis of the charges. This letter it was said was attached to an email sent by the lawyer to the Appellant's solicitors.

8. The judge noted the email printed by the Appellant's solicitors contained no attachment and he was critical of the Appellant's solicitors by their failure to provide correspondence between themselves and the Iranian lawyer. The judge concluded that this was a negative factor and identified it as a major difficulty with credibility at [37.4] and [43.2].

9. In particular the judge noted at [37.4] that "if there was lawyer to lawyer correspondence it should have been printed off as it was. There are no emails from the UK solicitors to the Iranian lawyer, as would be expected in order to get the documentation."

10. And at [43.3] noted that "The tendering as probative evidence of blank documents from the UK solicitor's office as if they are from the Iranian lawyer, when they are blank printouts from the UK solicitor's email account, of things forwarded to it, which are notoriously unreliable".

11. The judge further elaborated on the difficulties presented by this evidence at [46] to [49] and stated thus:

    "If the account were reasonably likely to be true the first thing to establish is that there is an Iranian lawyer instructed by the appellant. The next thing to do is to have correspondence from and to that lawyer to establish that the evidence tendered is reliable. Neither of these have been done, and they would not have been difficult given that the Iranian lawyer is said to be cooperative.

    Further, the evidence tendered purported to be how documents were sent to the UK lawyer is totally unreliable when inspected. The letter of the 23rd May 2018 from the lawyer was said to have been delivered by hand to the solicitors: and it would have been simple to take a copy of the passport of that named relative to show an exit and entry stamp. The emails said to have attached documents lack credibility for the reasons given above.

None of these things are required where a claim is proved on other evidence, but when such evidence is available and any competent lawyer (and the appellant is represented by solicitors experienced in asylum work) would obtain it, the absence of it is a very significant credibility deficit by reason of *TK (Burundi)".*

12. It is apparent from the above that the judge was very concerned with the lacuna in the evidence and had significant doubts that the email and the evidence from the lawyer was as purported. In my judgement, the above paragraphs illustrate that an excessive degree of negativity was attached to the failure to adduce evidence of lawyer to lawyer correspondence and thereby to the Appellant's credibility as opposed to the reputation of his solicitors. On the judge's analysis the fault was that of the Appellant's solicitors, but this failing was transferred to the Appellant by a misapplication of the guidance given in TK (Burundi) [2009] EWCA Civ 40. While the judge assessed the availability of the evidence, its significance to the case, he did not consider the reasons for its absence and it does not appear that the appellant or indeed his solicitors were given an opportunity to explain the omission(s). I thus conclude that it was not open to the judge to rely on the absence of evidence in rejecting the Appellant's account.

13. In the circumstances, I am satisfied that the judge's approach to the evidence from the Appellant's lawyer in Iran is flawed.

14. Second, the judge's record of proceedings indicates that in cross-examination the Appellant agreed to the Presenting Officer's suggestion that "in your witness statement for the first time you say that your family home raided – is that correct" (sic). What followed was a series of questions about that incident which concluded with the Appellant's evidence that his shop was raided, his home was inspected, and that, the latter was not hitherto mentioned as it was not important as nothing was taken. What then followed was a further suggestion, contrary to the first suggestion, put to the Appellant by the Presenting Officer that, " in your witness statement you do not say your home was raided, only your shop, why not say in your witness statement that home was also raided".

15. The judge concluded that the inconsistency was a "negative factor" and concluded that this presented a "major" difficulty and was "very damaging" to the Appellant's credibility. It is clear that this was a material issue in the judge's assessment that impacted upon his overall assessment of credibility.

16. There was considerable debate about this issue at the hearing. I do not accept the submission that there was a deliberate attempt by the Presenting Officer to entrap the Appellant, in initially putting to him that he referred to a home raid in his witness statement when he clearly had not. That is a serious allegation and there is no evidence to support it.

17. However, I do accept that the question was misleading and should not have been put and corrected either by the Appellant's representative or by the judge before a response was elicited from the Appellant. While I appreciate that the Appellant initially confirmed the suggestion that he had referred to the raid in his witness statement and thereafter gave an account of it, I agree with Mr Gayle that there may have been many reasons other than untruthfulness as to why the appellant did not resile from the suggestion. Whilst it is unfortunate that the question was put or indeed allowed to be put, the judge was aware that the error was inadvertent, but an appropriate assessment was not made of the weight that should properly be attributed to that evidence given the manner in which it was procured.

18. I am satisfied that the approach was improper and as a consequence there has been procedural unfairness. It is clear that the judge placed significant weight on this evidence and given the fundamental nature of an asylum decision and the consequences for the Appellant, it would be inappropriate in those circumstances to compound the unfairness by refusing to set aside the Decision.

19. In light of all of the above, I set aside the judge's decision.

Disposal

20. Both representatives were agreed that if I were to find a material error of law this appeal would have to be remitted to the First-tier Tribunal for a complete re-hearing. Having regard to the nature of the error I deem it appropriate to take this course of action.

Decision

I am satisfied that the Decision involved the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Housego is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different judge.

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 his 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 April 2019

Deputy Upper Tribunal Judge Bagral