Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11355/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 12 June 2019 **On 18 June 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

ML
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert, instructed by J D Spicer Zeb Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity direction. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or any member of his family.

This is the appellant's appeal against the decision of First-tier Tribunal Judge Sweet promulgated on 21 March 2019 dismissing his appeal against the decision of the Secretary of State dated 12 September 2018 to refuse his protection claim.

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First-tier Tribunal Judge O'Brien granted permission to appeal on 7 May 2019. Thus, the matter comes before me in the Upper Tribunal for an error of law hearing.

In the first instance, I have to determine witness or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

The background can be summarised as follows. The appellant's claim for asylum is based on the (political opinion) fear that on return he will be killed by the Taliban because of his former role in the Afghan Border Police Force. There was fighting between Taliban-supported drug smugglers at the post or base at which he was stationed. After three smugglers were killed in 2013 the Taliban sent village elders to persuade him to surrender to the Taliban to avoid being killed. On another occasion a Taliban commander had been killed. He returned to his post two days later but found everyone had left and the Taliban had burnt down the post. In addition, his brother-in-law had been tortured and his family had been sent threatening letters. He continued to work as a police officer, at a different base, but the Taliban continued to attend his family home, seeking his whereabouts. After the base was bombed in early 2014, which the appellant considers was a personal attack against him, he left his job and went to different areas, including Kabul for two months, before leaving Afghanistan in June of 2014. He arrived in the UK in June 2016 and claimed international protection. No human rights claim was pursued.

The respondent accepted that the appellant had worked as a police officer but rejected the claim to have been personally targeted by the Taliban.

Between paragraphs 39 and 43 of the decision Judge Sweet rejected the appellant's factual claim as not credible and doubted the veracity of the documents adduced by the appellant, including a letter from the Taliban from 2012/13 and, more particularly, a petition lodged with the authorities in Afghanistan in 2016/17. In addition, the judge found the appellant had the option of internal relocation to Kabul, relying on AS (Safety of Kabul) Afghanistan [2018] UKUT 00118 (IAC). The appeal was dismissed on all grounds.

The primary grounds assert that the judge prevented the appellant's Counsel, Ms Emma King from addressing him in full in her closing submissions, thereby creating material unfairness and the appearance of bias. Ms King did not attend the hearing as a witness even though there is a witness statement from her dated 26 March 2019, although unsigned. Mr Gilbert, who did not have a signed copy of the statement, confirmed that Ms King was aware of the hearing today and was intending to attend but had not done so because of childcare difficulties. Mr Gilbert accepted that put him in some difficulties in pursuing this aspect of the appeal. Also, at the grant of permission stage the allegation against the judge should have been identified and he should have been asked for comment. That did not happen. Bearing in mind my other findings below, the likelihood of which I highlighted in advance to the parties, Mr Gilbert did not

pursue the allegation of procedural unfairness or appearance of bias, and thus I need not address that issue further.

There are two other substantive grounds, the second of which addresses the risk on return on relocation to Kabul, to which I will turn in a moment. The first, however, directly addresses the credibility of the factual claim. As noted above, the judge dismissed the appellant's factual account in a very short number of paragraphs amounting to less than a page of the decision. Ms Willocks-Briscoe submits that there is nothing intrinsically wrong with a short decision, provided the findings are clear and that it is reasoned.

The grounds take issue with the judge's treatment of what is called a 'petition,' copied at pages 30 to 33 of the appellant's bundle, which a friend of the appellant lodged with the authorities in Afghanistan sometime in the period between 2016 and 2017. At paragraph of the decision 39 the judge stated: "The appellant was not able to explain why this petition was lodged some years after he left Afghanistan, or what prompted the petition – and I am left with the only conclusion that this was provided in order to bolster his claim for asylum." I accept, as Ms Willocks-Briscoe pointed out, the judge went on at paragraph 40 to address some specific concerns about the content of that document. However, the way in which paragraph 39 is drafted, it appeared to the appellant and appears to me that the judge may well have misunderstood the nature of the petition.

The appellant was asked about this matter in evidence and the judge's summary of that appears at paragraph 20 of the decision. He was asked why it was lodged with the police four years later to the instance relied on. He said he needed the document to show that his claim was genuine. The petition was lodged with the chief of police at a provisional level and that chief of police then referred it to other branches. In other words, it was made clear that the appellant was seeking to corroborate his factual claim from within the UK by having a document, prepared by a friend or family or both, submitted to the authorities to confirm his factual account of events as I have described in the summary of the appellant's case. It is obvious that this document was prepared long after the events in question and obvious why the appellant went about obtaining this document. I find that the judge may well have misunderstood the nature of this document and relied on the late obtaining of it as a point against the appellant in the assessment of the credibility of his factual claim. The very suggestion that it was provided in order to "bolster his claim for asylum" suggests that the judge believed it was a false or unreliable document, prepared solely in order to bolster his claim for asylum. As Mr Gilbert has submitted, it is obvious that it was indeed prepared in order to "bolster" his claim in the sense that he was seeking to corroborate his factual basis of claim by obtaining an endorsement of those facts from those who were in a position to confirm them in Afghanistan. It is difficult to see why he should be criticised for doing so. The judge would have been entitled to treat such a document cautiously but the lateness of it being obtained is not a factor that necessarily undermines its reliability. Of course, these comments do not address the other aspects of the document dealt with by the judge at paragraph 40 and on which Ms Willocks-Briscoe relies. However, if the judge

has or may have misunderstood the nature of the obtaining of the petition, I find that there are so few additional factors relied on in the short number of paragraphs in the decision that actually comprise findings of fact that this factor has to be regarded as a significant component of the credibility assessment but one which was in factual error. I find that the apparent mistake of fact undermines the sustainability of the findings as a whole in relation to the credibility of the appellant's claim and the judge's dismissal of that claim at paragraph 43 of the decision. For that reason alone, this decision cannot stand.

In addition, I find that the judge's treatment of the risk on return is inadequately reasoned and does not apply any of the guidance from AS. The judge simply states at paragraph 44:

> "I do not consider that internal relocation to Kabul or another safe area would be unreasonable. There is no reason why his family could not join him there, and I am not persuaded that he would not be able to be re-engaged by the police force for whom he previously worked."

Given the arguable difficulties on return to Kabul, I find that this is an inadequate assessment of the risk on return, particularly where the appellant would be returning to live with his wife and two young children.

In any event, AS was appealed to the Court of Appeal, who found that the Upper Tribunal had made significant errors in assessment of the safety in Kabul. The matter has been remitted to the Upper Tribunal to re-assess the risk in Kabul. That decision is pending before the Upper Tribunal. I bear in mind that the findings in relation to risk on return are drafted in the alternative, and therefore may not be a material error of law in this decision. However, I find that it may well be necessary to make an assessment of risk on return if, when the appeal is reconsidered or redecided, his factual claim is accepted, or some other reason suggests that the risk on return needs to be considered.

In all the circumstances and for the reasons set out above, I find that there is a material error of law in the decision of the First-tier Tribunal such that it cannot stand and must be set aside to be remade.

When a decision of the First-tier Tribunal has been set aside Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the cases are remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. Where the findings and conclusions are unclear on crucial issues at the heart of appeal, as they are in this case, effectively there has not been a valid determination on those issues. I am satisfied that the errors of the First-tier Tribunal vitiate all findings of fact and the conclusions from those facts. In all the circumstances, and noting that the decision to do so is not opposed by either party, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's practice statement at paragraph 7.2.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Upper Tribunal Judge Pickup

Dated 12 June 2019

Consequential Directions

The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross;

The appeal should not be heard until after the promulgation of the Upper Tribunal's decision remaking AS;

The estimated length of hearing is three hours;

A Pushtu interpreter will be needed;

The appeal may be listed before any First-tier Tribunal Judge with the exception of Judge Sweet and Judge O'Brien.

To the Respondent
Fee Award

In the light of my decision I make no fee award.
Reasons: the outcome of the appeal remains to be decided.

Signed

Upper Tribunal Judge Pickup

Dated 12 June 2019