



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11159/2019(P)

THE IMMIGRATION ACTS

Decision under Rule 34
On 21 August 2020

Decision & Reasons Promulgated
On 25 August 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

K J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Decision made under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Ali ('the Judge') sent to the parties on 27 February 2020 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.
2. By a decision dated 13 May 2020 Judge of the First-tier Tribunal Bird granted the appellant permission to appeal on all grounds.
3. The appellant's legal representatives are Fountain Solicitors, Didsbury.

'Rule 34'

4. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').
5. In light of the present need to take precautions against the spread of Covid-19, UTJ Kekic considered the papers filed in this matter and observing the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), indicated by a Note and Directions sent to the parties on 10 June 2020 her provisional view that it would be appropriate to determine the following questions without a hearing:
 - (i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so
 - (ii) Whether the decision should be set aside.
6. The parties were requested to inform the Tribunal if, despite the directions, a face-to-face hearing was required. The time limit for such objections has passed and neither party raised an objection to the Tribunal's provisional view.
7. The appellant filed written submissions, authored by Ms. Butler, Fountain Solicitors, dated 10 June 2020. Written submissions authored by Ms. Fijiwala, dated 15 June 2020, were filed by the respondent. The Tribunal is grateful to the representatives for their helpful submissions.
8. The Tribunal further received a short reply from the appellant's representatives which is addressed below.
9. In the circumstances and being mindful of the importance of these proceedings to the appellant and to the overriding objective that the Tribunal deal with cases fairly and justly I am satisfied that it is just and appropriate to proceed under rule 34.

Anonymity

10. The Judge did not issue an anonymity direction despite this being a matter in which the appellant has sought international protection. I am mindful of Guidance Note 2013 No 1 concerning anonymity directions and I note that the starting point for consideration of anonymity directions in this chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. However, I observe paragraph 13 of the Guidance Note where it is confirmed that it is the present practice of both the First-tier Tribunal and this Tribunal that an anonymity direction is made in all appeals raising asylum or other international protection claims. Pursuant to rule 14 of the 2008 Rules I make an anonymity direction in order to avoid the likelihood of serious harm arising to the appellant from the contents of his protection claim becoming known to the wider public.

11. The direction is detailed at the conclusion of this decision.

Background

12. The appellant is a national of Afghanistan and is presently aged 26. He asserts a well-founded fear of the Taliban. He also asserts a fear of a rival family consequent to his relationship with his fiancée.
13. The appeal came before the Judge sitting at Bradford on 23 December 2019. He did not find the appellant to be a credible witness and dismissed the appeal.

Grounds of appeal

14. The appellant filed detailed grounds of appeal raising two identified grounds challenging the Judge's approach to credibility and his consideration of expert evidence. As to credibility, the grounds identify several instances where in making adverse findings the Judge failed to consider answers given by the appellant in his interview and his witness statement. When considering the challenge to the approach adopted to the expert evidence Judge Bird reasoned, *inter alia*:

'It is arguable that in not properly engaging with the expert's opinion and instead of considering the appellant's evidence against the opinion of the expert, the judge has misinterpreted how expert evidence is to be assessed. In making a decision on the appellant's credibility first at paragraph 55 before going on to consider the expert opinion at paragraph 56 shows that the Judge failed to adopt a holistic approach.'

15. By means of her short submissions Ms. Fijiwala accepted on behalf of the respondent that it was accepted that the Judge materially erred by a failure to consider the evidence in the round.
16. I am satisfied that the respondent has adopted the correct position. It is a concern that the Judge made express criticisms at [43] of his decision as to the inadequate preparation of the appeal by the appellant and his legal representatives, and the failure of the appellant's witness statement to 'rebut or address any of the discrepancies, inconsistencies or issues in dispute set out in the refusal letter' in circumstances where the witness statement, which runs to 40 paragraphs, sought to provide explanations to concerns raised in the decision letter. The failure to expressly engage with the appellant's evidence is a material error of law.
17. Further, the Judge has adopted an approach long confirmed to be unlawful in making findings of fact as to the appellant's personal history over 14 paragraphs and, having found the appellant to be an incredible witness at [55], only then proceeded to consider the expert report of Mr. Zadeh. The Court of Appeal confirmed as long ago as 2005 in *Mibanga v. Secretary of State for the Home Department* [2005] EWCA Civ 367; [2005] I.N.L.R. 377 that a judge will materially err in law if they make findings as to credibility and conclude that an appellant has not been 'wholly credible' before

examining expert evidence. The Tribunal is significantly concerned at the approach adopted by the Judge at [56] which is encapsulated by the following reasoning:

'... The expert states at paragraph 30 of his report that the appellant be [sic] a target of the Taliban. I do not agree with this given that I have already found the appellant not to be credible in this aspect of his case. The expert states at paragraph 37 that the risk to the appellant as a result of his engagement and [sic] real and threatening. I do not agree with this given that I have already found the appellant not to be credible in respect of his case ...'

18. The Judge has materially erred in his consideration of the appeal before him and such errors adversely permeate throughout the decision. Consequently, the decision must be set aside.

Remaking the decision

19. The respondent requests that the matter be remitted to the First-tier Tribunal so that credibility can be considered afresh.
20. Surprisingly, by her short undated reply Ms. Butler requests on behalf of the appellant that upon the Tribunal finding a material error of law it proceed to consider the matter substantively on the papers because 'given the thorough and detailed evidence before the court [sic], chiefly the witness statement, expert report and skeleton argument, the court [sic] would be justified in allowing the present appeal outright'. This request is made in circumstances where the appellant has successfully secured the setting aside of the First-tier Tribunal's findings of fact, thereby requiring such findings to be remade, and where numerous adverse credibility issues are raised by the respondent in her decision letter of 6 November 2019. I am satisfied that this is a wholly unrealistic request as it would deny the respondent a fair hearing.
21. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. I am satisfied that the effect of the material errors identified above has been to deprive both parties of a fair hearing before the First-tier Tribunal and so it would be just to remit the matter to the First-tier Tribunal: paragraph 7.2(a) of the Joint Practice Statement.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 27 February 2020 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
23. This matter is remitted to the First-tier Tribunal sitting in Bradford for a fresh hearing before any Judge other than Judge of the First-tier Tribunal Ali.

24. No findings of fact are preserved

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

25. 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. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 21 August 2020

