



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/01930/2021 V
[UI-2021-001290] PA/50959/2021

THE IMMIGRATION ACTS

**Heard at Field House via Decisions & Reasons Promulgated
Teams/hybrid
On 3rd May 2022**

On 23rd June 2022

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**MAA
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Amin, of Counsel, instructed by Sohaib Fatimi
Solicitors

For the Respondent: Ms E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 1988. He arrived in the UK and claimed asylum in November 2007. His application was refused by the respondent in August 2018. His appeal against the decision was dismissed by Judge of the First-tier Tribunal Smith in a determination

promulgated on 2nd October 2018. The appellant then made a fresh claim on asylum and human rights grounds. The fresh claim was refused by the respondent on 16th February 2021. The appeal against this decision was dismissed by First-tier Tribunal Judge JK Thapar in a decision promulgated on the 12th October 2021.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Grey, and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision at Annex A.
3. I issued directions for a CMR hearing so that the respondent could clarify whether the position in the reasons for refusal letter, that it was accepted that the appellant is a citizen of Afghanistan, was maintained and also to clarify whether the refusal of asylum was still maintained by the respondent in light of the changed country situation in Afghanistan. The appellant was invited to serve any updating evidence on the issue of his nationality.
4. The matter came back before me, originally simply for a case management review hearing although eventually it was possible, for the reasons I set out below to remake the appeal. The hearing took place as a hybrid hearing with Ms Amin and the appellant appearing via video link and Mr Tufan being present in the hearing room. This was a format to which no party raised an objection. There were no significant issues of audibility or connectivity for those who appeared via video link.

Proceedings at the Hearing

5. The appellant had filed a small bundle including an updating statement and copies of his Afghan passport and Afghan national identity card on the issue of his nationality. The respondent had not replied in writing. However Mr Tufan had had the opportunity to examine the file and was able to inform the Upper Tribunal that the respondent maintained the position taken in the original reasons for refusal letter that the appellant is a citizen of Afghanistan.
6. Mr Tufan also informed the Upper Tribunal that he was able to concede the appeal as he accepted for the Secretary of State, given the current country situation in Afghanistan, that the appellant is a refugee on account of his particular social group as a westernised Afghan with mental health problems.
7. Ms Amin had been concerned about the considerable delays the appellant had experienced in the determination of his applications and appeals but was grateful to Mr Tufan for bringing the matter to a close in the appellant's favour.

Conclusions - Remaking

8. The appeal is allowed by consent on the basis that the appellant has a well founded fear of persecution if returned to Afghanistan by reason of his particular social group.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision and all of the findings of the First-tier Tribunal.
3. I remake the appeal by allowing it on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 3rd May 2022

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 1988. He arrived in the UK and claimed asylum in November 2007. His application was refused by the respondent in August 2018. His appeal against the decision was dismissed by Judge of the First-tier Tribunal Smith in a determination promulgated on 2nd October 2018. The appellant then made a fresh claim on asylum and human rights grounds. The fresh claim was refused by the respondent on 16th February 2021. This appeal was dismissed by First-tier Tribunal Judge JK Thapar in a decision promulgated on the 12th October 2021.
2. Permission to appeal was granted by Judge of the First-tier Tribunal Grey on 22nd November 2021 on the basis that it was arguable that the First-tier judge had erred in law in failing to accept that the appellant was a national of Afghanistan when the respondent accepted this fact in the reason for refusal letter and at the hearing; by failing to consider the country expert report of Tim Foxley; failing to consider whether the appellant fell into a particular social group by reason of his mental health; by failing to consider other new evidence arising since the decision of the previous First-tier Tribunal; by reaching erroneous and speculative findings regarding the expert evidence of Ms Costa; by relying on the country guidance case of AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130; and failing to consider paragraph 276ADE(1)(iv) of the Immigration Rules.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether the decision and any findings should be set aside. The hearing took place via video link, a format to which no party raised an objection. There were no significant issues of audibility or connectivity.

Submissions- Error of Law

4. In the grounds of appeal and oral submissions it is contend, in summary, for the appellant as follows.
5. Firstly it is argued that it was an error of law to fail to consider the country of origin expert report from Mr Tim Foxley, which went to the core issues of the appellant being at real risk of serious harm in Afghanistan and was evidence that was not before the previous First-tier Tribunal Judge.
6. Secondly, it is argued, that the First-tier Tribunal erred in law because there was a failure to consider the evidence of Dr Costa, and thus that the appellant is a member of a particular social group due to his serious mental health issues.

7. Thirdly, it is argued, that the First-tier Tribunal erred in law by failing to start from the position in the reasons for refusal letter that the respondent now accepted the appellant was a citizen of Afghanistan (which had not been the position of Judge Smith in the 2018 decision). As this was conceded the First-tier Tribunal must accept this concession unless it was withdrawn at the hearing, which it was not.
8. Fourth, it is argued, that the First-tier Tribunal failed to consider the fresh evidence in the appellant's bundle at pages 1-122 when considering the appeal in an erroneous application of Devaseelan.
9. Fifthly, it is argued, that the First-tier Tribunal erred by applying AS (Safety of Kabul) Afghanistan at the hearing on 25th August 2020 when the country situation had changed profoundly, as the Taliban controlled almost all of Afghanistan at that time, and the respondent had removed its guidance notes relating to this test and were no longer relying on this decision with respect to internal relocation. The appellant provided updating country of origin materials which ought, in the circumstances, to have been relied upon. In addition the First-tier Tribunal finds that the appellant would not be at risk on return to Pakistan when removal was to Afghanistan.
10. Sixthly, it is argued, that the First-tier Tribunal erred in law in relation to the findings by Ms Costa, as the evidence is discounted for erroneous reasons: it is stated that she was not provided with the refusal decision when she clearly was and it is stated that activities with the appellant's partner did not feature when these activities were in fact mentioned.
11. Seventhly, it is argued, that the First-tier Tribunal erred in law in failing to consider the Article 8 ECHR appeal with reference to the Immigration Rules at paragraph 276ADE(1)(vi), which was an error of law particularly as he has lived in the UK for 14 years and gave evidence of his family life with his partner.
12. The respondent did not provide a Rule 24 notice but Ms Cunha made submissions in which she conceded that the First-tier Tribunal had erred materially in law because there was a failure to consider the expert evidence which had not been before the previous First-tier Tribunal. She did not have a record of proceedings from the presenting officer who was before the First-tier Tribunal so she was not able to comment on the matter of the First-tier Tribunal going behind the concession in the refusal letter that the appellant was a citizen of Afghanistan.
13. I told the parties that I was therefore intending to set aside the decision of the First-tier Tribunal and all of the findings, but I did not give an oral judgement and instead set out my reasoning below in my "conclusions on error of law" section of this decision.
14. I agreed that the remaking should remain in the Upper Tribunal. Ms Cunha suggested that the matter be listed for a CMR in one month time so as to give time to the respondent to consider if they wished to grant the appellant leave to remain on some basis and to clarify their position

on his nationality. She indicated that if the appellant wished to submit any further evidence going to his nationality or other issues that this should be filed with the Upper Tribunal and served on the respondent and would then form part of this reconsideration. I agreed that a video link CMR would take place in approximately one month's time to allow for the possibility for the appeal being resolved via a grant of leave and for the respondent to clarify her position on the appellant's nationality, but that it would then be relisted for a remaking hearing at the first available date.

Conclusions - Error of Law

15. It is clear that the appeal before the First-tier Tribunal took place at a point in time when the country of origin situation in Afghanistan was changing rapidly as the respondent applied for an adjournment on this basis as recorded at paragraph 9 of the decision and drew attention that she had removed country of origin information from the website, and it appears that this was not disputed when the adjournment was refused. However when the most recent Afghan country guidance case is noted as something that was taken into account at paragraph 16 of the decision no reference is made to the question as to whether it should be followed due to the profound political changes which were taking place in Afghanistan. I find that this was an error of law in relation to the country guidance case.
16. The First-tier Tribunal correctly notes that the decision of the previous First-tier Tribunal was the starting point for the decision, and sets out details of that decision at paragraphs 20 to 24. What the First-tier Tribunal ought then to have done is to set out and evaluate the new evidence, including that of Mr Foxley, but instead at paragraph 25 there are a series of matters listed as implausible and incoherent elements which appear in some cases to be taken from the decision of Judge Smith and in other cases appear to be evaluation of new evidence such as the statement of Mr W, the ID document and Facebook evidence. I find that the decision errs in law for failure to engage clearly with the new evidence, that had not been before the previous First-tier Tribunal, and set out the findings on that evidence.
17. The First-tier Tribunal starts the decision by stating that the appellant is a national of Afghanistan at paragraph 1 of the decision. The First-tier Tribunal acknowledges that the respondent accepts the appellant is a citizen of Afghanistan but then dismisses the appeal on the basis that it is found that the appellant is not a citizen of Afghanistan for reasons set out at paragraphs 26 to 29 of the decision. For this to be an approach lawfully open to the First-tier Tribunal the appellant needed to be put on notice that the concession of the respondent was not accepted. Whilst I do not have sufficient evidence that this was not done, despite the submission by Ms Amin that it was not, as there is no witness statement from the appellant's representative before the First-tier Tribunal and I have no record of proceedings, I do find that the decision is insufficiently reasoned on this point. The decision ought to have set out that the First-

tier Tribunal Judge put the appellant on notice that she did not accept that the appellant was an Afghan national and ensured he was in a position to respond to this new issue, as this was essential to explaining how the decision of the First-tier Tribunal was fairly made on this point.

18. I do not find that the First-tier Tribunal erred in the treatment of the psychological evidence from Ms Costa but the appellant is on medication from his GP for depression and anxiety, so that should have been taken into account when considering whether he would have very significant obstacles to integration on return in Article 8 ECHR analysis.
19. For these reasons I conclude that the decision of the First-tier Tribunal materially erred in law, and the decision and all of the findings must be set aside.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision and all of the findings of the First-tier Tribunal.
3. I adjourn the re-making of the appeal.

Directions:

1. The appeal will be listed for a 30 minutes CMR hearing via video link at the first available date before me.
2. The appellant will file with the Upper Tribunal and serve on the respondent any updating evidence with respect to any matter including his nationality as soon as this is available and in any case ten days prior to the date of the CMR hearing.
3. The respondent's representative will use her/his best endeavours to be in a position to inform the Upper Tribunal at the CMR hearing whether the refusal decision is maintained in full or in part, and/or provide a copy of any new decision.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 22nd March 2022