



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

Appeal Number: AA/08827/2013

THE IMMIGRATION ACTS

Heard at Field House

Determination

On 25 March 2015

Promulgated

On 10 April 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

SKM

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse of Counsel, instructed by Haris Ali, Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal against a decision by Judge of the First-tier Tribunal Beach dismissing an appeal on asylum and human rights grounds.
- 2) The appellant was born in 1995 and is a national of Afghanistan. He left Afghanistan around February 2009 and claimed asylum in the UK in August 2009 after entering clandestinely. His claim was refused but he was given discretionary leave until December 2012. In the same month he made an application for further leave to remain. This was refused, giving rise to the present appeal.

- 3) The appellant claimed that his father was involved with Hizb-i-Islami and was executed by the Taliban as a suspected spy. The appellant's family was in a violent dispute with his father's cousins over an inheritance. The cousins were associated with the Taliban. The Taliban wanted to take the appellant as a child soldier or suicide bomber and it was because of this that the appellant's family arranged for him to leave Afghanistan.
- 4) The Judge of the First-tier Tribunal did not believe the appellant's evidence and because of this the appeal was dismissed. The decision was challenged in the application for permission to appeal on a number of grounds. It was alleged that the judge misdirected herself, failed to consider relevant evidence and failed to give adequate reasons. Permission to appeal was granted on the basis that the grounds were arguable.
- 5) A Rule 24 notice dated 11 February 2015 on behalf of the respondent submitted that the judge had properly assessed the credibility of the appellant's account and had given adequate reasons. Taking the claim at its highest the judge found the alternative available to the appellant of relocation to Kabul.
- 6) At the hearing Ms Hulse addressed me in relation to the grounds of the application. She referred, in particular, to a medical report on the appellant by Dr Juliet Cohen. This medical report pointed out that the appellant had problems with his memory. The judge did not take issue with this diagnosis but nevertheless found that significant points in the evidence given by the appellant were not satisfactorily explained. The judge in so doing did not take account of the medical evidence about the difficulty the appellant had in remembering events. The judge further found that the appellant had acquired skills and had received an education which he would be able to use in Afghanistan but again this contradicted the medical evidence. Ms Hulse referred as well to an expert report on behalf of the appellant by Dr Giustozzi. Ms Hulse suggested that the family dispute with the appellant's father's cousins had been wrongly categorised as a blood feud when in fact it was a family quarrel over land. The judge commented that Dr Giustozzi had accepted the appellant's evidence as proven but this was not correct. Dr Giustozzi had been asked in his report to address certain points and he had done so. Ms Hulse commented in particular on a finding by the judge that the appellant had raised the issue that his father might have been considered by the Taliban to be a spy only after this was suggested in Dr Giustozzi's report. However the statement in which the appellant referred to his father having been suspected of being a spy pre-dated Mr Giustozzi's report. The judge's conclusion that the appellant had made this claim only after Dr Giustozzi had written his report was completely wrong.
- 7) Ms Hulse pointed out that the judge had discounted the evidence of the appellant's mother on the basis that the appellant's mother would be bound to support him. Ms Hulse submitted there was no authority to say that the evidence of the family member could be disregarded without more. The judge might bear in mind that a mother would want to support her son but it did not follow that her evidence should be disregarded.

- 8) For the respondent, Mr Clarke submitted that the judge was entitled to come to the conclusions she did in relation to the evidence of the appellant's mother. Her evidence was not rejected because she was a relative but because the judge had already made an adverse credibility finding in respect of the appellant.
- 9) Mr Clarke acknowledged that Dr Giustozzi's report post-dated the appellant's claim that his father had been treated as a spy but Mr Clarke submitted that this was not material. The death of the appellant's father was raised four years after the appellant came to the UK. Mr Clarke acknowledged that at the time the appellant arrived in the UK he thought his father was still alive but the point about whether his father was regarded as a spy was not material. The issue of whether the appellant's father was regarded as a spy was not determinative of the appeal.
- 10) Mr Clarke further pointed out that a witness on whom the appellant had relied to speak to his father's involvement in his Hizb-i-Islami had not appeared at the hearing.
- 11) Among the various points raised on behalf of the appellant as amounting to errors of law, there are two in particular which concern me. One of these relates to the suggestion that the appellant claimed that his father was regarded as being a spy as a result of receiving Dr Giustozzi's report. The second issue concerns the judge's treatment of the medical evidence in the form of the report by Dr Cohen.
- 12) The judge's reasoning, at paragraph 57, includes the following:

"The appellant states that his father has since been killed in Kabul. There is very little detail with regard to the reasons for his father's death. The appellant's mother gives some information in a report to the authorities but this is undated and it is entirely unclear to me why the report was made or why. Given that the appellant's mother must have known that the appellant had claimed asylum and had been refused then it is not surprising that any document from her would support the appellant's claim. I find the document from the appellant's mother is a self-serving document and does not provide independent verification of the appellant's claim. I note also that the suggestion that the appellant's father might be considered to be a spy by the Taliban and this is why he was killed was only raised by the appellant after it was raised as a possibility in the expert report which is dated 15 October 2013. The appellant's witness who claimed to have attended the funeral has withdrawn his support from the appeal and so I can take no account of that witness statement. Mr RR simply states that he was informed that the appellant's father had died in 2011 and gave no further details as to how the appellant's father was allegedly killed. I note, too, that although there is other documentary evidence, there is no death certificate for the appellant's father. I find that there is insufficient evidence to show that the appellant's father was killed or that he was killed as a result of a targeted assassination."

- 13) In this excerpt from the determination the judge clearly misapprehended the evidence in relation to the appellant's account of his father's death. The appellant's statement indicating that his father had been killed as a spy by the Taliban was dated 11 October 2013 whereas Dr Giustozzi's report was dated 15 October 2013. The appellant's statement thus pre-dated the report and the claim that the appellant's father was executed as a spy was raised by the appellant before Dr Giustozzi's report was completed.
- 14) Mr Clarke submitted that this misapprehension by the judge was not material, in part because the death of the appellant's father took place in 2011 after the appellant had left Afghanistan. I disagree with this submission. The issue was used by the judge as a reason for not accepting the appellant's evidence as credible. The judge's reasoning on this point related to the appellant's overall credibility and not to his stated reasons for leaving Afghanistan or his fear of return. It may be pointed out that this was only one issue amongst several credibility issues considered by the judge but it does seem that the judge relied upon these credibility issues cumulatively. If one is taken away as based on a misapprehension, it is difficult to know what the judge's conclusions might have been without this factor.
- 15) I am satisfied that the judge's misapprehension on this point constitutes an error of law. The judge's credibility findings are rendered unsafe by this error and the decision should therefore be set aside.
- 16) I turn next to the judge's treatment of the medical report by Dr Cohen. At paragraph 48 of the determination the judge quoted from the reports to the effect that the appellant's memory and concentration are poor. The report stated that the appellant often did not answer questions but responded at a tangent. He struggled to recall details and was evidently distressed when pressed. When he was asked to recall events in Afghanistan he felt increasingly stressed and experienced pain and a pressure sensation in his head. He said that this was likely to happen again if he was questioned in court. Dr Cohen concluded, as the judge quoted at paragraph 49, that the appellant had very low mood, outbursts of anger and irritability, sleep disorder with nightmares and difficult falling asleep as well as waking through the night. Symptoms of PTSD were not particularly pronounced. He did not describe an incident of overwhelming threat to life but there was so little disclosure about his journey to the UK that Dr Cohen could not rule out that there was an event during his journey that he had yet to disclose. The causes for his mental health problems appeared to lie in his difficult journey to the UK, his separation from his family and grief for the death of his father.
- 17) Because of his medical difficulties the appellant did not give evidence at the hearing before the First-tier Tribunal. The judge recorded at paragraph 53 that the medical evidence suggested that the appellant would find it extremely difficult to give evidence and the judge would not take any adverse view of the appellant choosing not to give evidence. Nevertheless, at paragraph 56, when the judge came to examine the evidence given by the appellant in his witness statement and previously as to the family land dispute and the attempt by the Taliban to recruit him, the judge rejected

portions of the evidence seemingly on the grounds that it was not plausible, although the judge used the word “credible” rather than plausible. Indeed, it may be observed as an aside that had the judge approached the report by Dr Giustozzi as related more to plausibility than credibility the judge’s reasoning might have been more soundly based.

- 18) So far as these particular findings of the judge are concerned in relation to the appellant’s claims, I do not consider the judge’s reasoning is adequate, having regard to the medical evidence and also to the report by Dr Giustozzi. Given the appellant’s memory problems, and taking into account his age and the expert’s report, more reasoning was required by the judge before the appellant’s account could be rejected because crucial points were said to lack credibility. I consider that this lack of adequate reasoning amounts to a further error of law by the judge.
- 19) The appeal was listed before the Upper Tribunal subject to directions stating that that the parties should prepare for the hearing on the basis that it would be confined to whether the determination of the First-tier Tribunal should be set aside for legal error and, if so, whether the decision could be re-made without having to hear oral evidence. I consider that the nature of fact finding required in order to re-make the decision is such that it should be remitted for a full hearing before a Judge of the First-tier Tribunal other than Judge Beach. None of the findings of fact made by the First-tier Tribunal are to be preserved.
- 20) Ms Hulse stated that there was new evidence now available. This new evidence should be served on the other party and submitted for the purpose of the hearing before the First-tier Tribunal with, of course, an appropriate explanation as to why this evidence was not produced at an earlier stage. Regard should also be had to relevant country guideline cases.

Conclusions

- 21) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
- 22) I set aside the decision.
- 23) The appeal is remitted to the First-tier Tribunal for a hearing before a judge other than Judge Beach.

Anonymity

- 24) The First-tier Tribunal made an order for anonymity. This will remain in force pending the further hearing before First-tier Tribunal.

Signed

Date

Upper Tribunal Judge Deans