Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001649
IA/02429/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 June 2022	**On 3 August 2022**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR AKBAR MOHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z. Raza, Counsel instructed by Marks and Marks Solicitors
For the Respondent: Mrs A. Nolan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan. He was born on 1 October 1974. He appeals against a decision of First-tier Tribunal Judge Oxlade ("the judge") promulgated on 6 October 2021 dismissing his appeal against the decision of the Secretary of State dated 22 February 2021 to refuse his human rights claim, made on the basis he had accrued 20 years' continuous residence.

Factual Background

2. The appellant arrived in the United Kingdom in April 2000. It was common ground that he was here from then until at least 2003, and then from 2010 until the hearing before the judge on 20 September 2021. On 9 June 2020 he made a

human rights claim under the 20 year rule in paragraph 276ADE(1)(iii) of the Immigration Rules.

3. The application was refused by the Secretary of State on the basis that the evidence provided by the appellant did not demonstrate that he met the requirements of that Rule. Nor were any reasons to conclude at that stage that he would face very significant obstacles to his integration in Afghanistan for the purposes of paragraph 276ADE(1)(vi). At the time of the appellant's application, he was 45 years old and had spent at least the first 25 years of his life living in Afghanistan. There were no exceptional circumstances such that it would be unjustifiably harsh for the appellant not to be granted leave outside the Rules.

4. The appellant's human rights claim dated 9 June 2020 was not his first engagement with the Secretary of State. When he arrived in April 2000 he claimed asylum. He failed to attend the asylum interview, however, and his claim was refused on that basis. That was the final contact the appellant had with the Secretary of State until 26 October 2010. That was the date on which he made a claim under a so-called legacy scheme then in force. The application was refused.

5. On 24 May 2017 the appellant made a further human rights claim. That was refused by the Secretary of State in a decision dated 13 August 2018. The appellant's appeal against the refusal of that human rights claim was heard by First-tier Tribunal Judge Shiner. By a decision promulgated on 16 July 2019, Judge Shiner dismissed the appeal. Judge Shiner reached certain findings of fact which are relevant to the findings reached by the judge below in these proceedings to which I shall return in due course.

6. In the appeal before the First-tier Tribunal before Judge Oxlade, the Secretary of State had not been represented, with the consequence that the witnesses who appeared in support of the appellant had not been cross-examined. In addition to the appellant's evidence, the judge heard evidence from Asmatullah Kakar and Lajber Khan, friends of the appellant. Both witnesses stated that they lived with the appellant from his initial arrival in 2000 until around 2004, and thereafter had remained in touch with him, as they lived in a similar part of London. On their evidence, the appellant had been present in the United Kingdom for the entire period since his arrival in April 2000, they said. That included, crucially, the appellant's presence from 2003 to 2010. The judge identified at [35] of her decision that that was the crucial period upon which she would need to focus in her analysis of whether the appellant had been present for the twenty years as claimed, for it was common ground that the appellant had been present at all other times.

7. The judge commenced her operative analysis by addressing the decision of Judge Shiner. Judge Shiner had observed in his decision that he could not be sure that the appellant had been in the United Kingdom for the entirety of the time which he claimed to be. However, Judge Shiner stated that that was not an issue he had to resolve on that occasion. Rather, the focus of the proceedings before Judge Shiner was the refusal of the appellant's human rights claim and whether he would face very significant obstacles to his integration in Afghanistan. In reaching his findings that the appellant would not face such very significant obstacles, Judge Shiner found that he was in contact with his family in Afghanistan.

8. At [36] Judge Oxlade stated that the observations of Judge Shiner concerning the length of the appellant's continuous relevance in the UK were not relevant to her analysis of whether the appellant had been present for twenty years, which was the issue before her. She said:

> "In terms of general credibility the Immigration Judge Shiner had found that the appellant was not telling the truth as to contact with his family, his wife and parents and concluded that he probably was having at least telephone chat and concluded that this denial was with a view to the Tribunal concluding that the appellant was a single man with no support in Kabul which, as we all know, was a potential route to claim for humanitarian protection. So, whilst I accept that Mr Maqsood [Counsel for the appellant below] is factually correct, that the absence or presence of family in Afghanistan or contact with them was irrelevant to the question under (iii) the twenty year Rule, the appellant's continued denial about this does undermine his credibility and he is, I find, simply doing so to continue what was an untruth, maintaining a position because in this appeal he would still wish to fall back on the very significant obstacles."

9. The judge stated that she placed limited weight on an extract from the appellant's GP notes in which a doctor is recorded as having advised the appellant to tell his wife and children in Afghanistan that he had been diagnosed with hepatitis B. The judge said that she placed some, albeit limited, weight on those notes.

10. A significant feature of the appellant's case before Judge Oxlade was that he had no contact with any of his family in Afghanistan. That was, as the judge identified, relevant to the very significant obstacles issue under paragraph 276ADE(1)(vi) of the rules, but it was also relevant to the appellant's general credibility. She noted at [38] that the appellant had maintained the position that he was not in contact with his family in Afghanistan, despite Judge Shiner's findings to the contrary.

11. The judge also outlined the steps she considered the appellant could have – but had not – taken in order to make contact or attempt to make contact with his family in Afghanistan. Since the appellant's witnesses had maintained the position adopted by the appellant, namely that he had had not retained any contact whatsoever with his family in Afghanistan, the judge said, at [38]:

> "I find that also undermines the credibility of the witnesses who were called to give evidence as to residence. The strength of their evidence relies entirely on their credibility and I find that it is undermined by their following his position in respect of wife and children."

12. The judge then stated that she saw the strength of the appellant's argument that, having made a treacherous journey to the United Kingdom and having demonstrated that he was present from 2000 to 2003 and then again onwards from 2010, that it would not make sense for him to have left illegally in 2003 and then re-enter later, also illegally. She also directed herself at [40] that if a person is in this country illegally, producing a continuous paper trail would be difficult. However, she then went on to state as follows:

> "I take judicial notices [sic] of the cases in which those in the country illegally have secured genuine official documents; bank statements,

> sometimes, utility bills, sometimes DVLA records, GP records, mobile phone printouts, photographs of somebody at weddings or other events. There is often a plethora of information, if it has been sourced. So, I do not accept that it is universally the case that a person in the country illegally will have no paper trail whatsoever. It may not be continuous but there is often something there. In this case, from 2010 to 2021 there is, from 2000 to 2003 there is but there is this period of seven years missing."

The judge concluded that on the basis of the evidence adduced she had not been satisfied that the appellant had demonstrated to the balance of probability standard that the appellant had been in the UK for a continuous period of twenty years.

13. The judge also addressed paragraph 276ADE(1)(vi) concerning the presence of very significant obstacles to the appellant's integration in Afghanistan. It is important to note that the hearing on 20 September 2021 took place in the aftermath of the fall of Kabul to the Taliban. At that stage the respondent Secretary of State had suspended enforcement of removals to Kabul and there were no commercial flights for Afghans without status in the United Kingdom. She then said the following at [42]:

> "That in itself does not establish why this appellant would have very significant obstacles to his integration on a Kamara basis. The respondent says that the appellant lived in Afghanistan for 25 years, he has a wife and children. He is aware of the social and cultural rituals in Kabul, he has parents there. Those findings are clear from Immigration Judge Shiner's decision and the judge found that there was continuing contact. Whilst it is apparent from the news report that Kabul is in turmoil it remains the appellant's responsibility to discharge the burden of showing why there are very significant obstacles for him to return and to integrate there. That being so, he has not discharged that there is no evidence that he has adduced above and beyond that which was before Immigration Judge Shiner and therefore I find he has not established that those findings should be upset by any evidence which is specific to him."

14. The judge dismissed the appeal.

Grounds of appeal

15. There are a total of four grounds of appeal set out in the written grounds of appeal. Mr Raza on behalf of the appellant admirably summarised them under two headings. The first was that the judge's approach to the two witnesses adduced by the appellant and to the appellant's own evidence was perverse. The second is that in light of the well-established situation in Kabul at the time, it was not open to the judge to find that the appellant would not face very significant obstacles to his integration.

16. Permission to appeal was granted by First-tier Tribunal Judge Gumsley.

Submissions

17. Developing the reformulated grounds of appeal, Mr Raza accepted that by seeking to advance a perversity challenge in relation to the judge's findings

concerning the appellant's oral evidence and that of the two witnesses, he faced a high threshold. It was nevertheless met. He submitted that the position facing the appellant was to prove a negative and other than having adduced evidence of the sort he provided to the judge below, it is difficult to see how he could reasonably have been expected to provide any other evidence. No reasonable judge could have approached their findings as the judge did, he submitted.

18. Against that background, Mr Raza submitted that the Secretary of State's non-appearance before the First-tier Tribunal meant that the witnesses were not cross-examined and their evidence was not challenged in the way that would ordinarily be the case. That being so, the additional detail that would emerge during cross-examination and the testing of the witnesses' evidence, which of course in his submission may demonstrate its credibility rather than undermine it, did not take place. Accordingly, he submitted, it was not enough to reject the evidence of those witnesses and the oral evidence of the appellant on the sole basis that each witness maintained that the appellant was in contact with his family in Afghanistan when in reality the findings of Judge Shiner to support that contention were based simply on that judge's appreciation or impression of the plausibility of the appellant's evidence, see [44] to [46] of Judge Shiner's decision.

19. In relation to paragraph 276ADE(1)(vi), Mr Raza submitted that the position in Kabul as was known to the judge at the time merited the conclusion that there were very significant obstacles and the judge erred by failing to make a finding on that basis.

20. On behalf of the Secretary of State before me Mrs Nolan submitted that the judge reached findings of fact she was entitled to reach concerning the evidence of the appellant's claimed long residence, she analysed the evidence of the witnesses in terms that were open to her and in relation to paragraph 276ADE(1)(vi), the appellant had provided very little evidence, it being his case to prove he had simply failed to do so.

The Law

21. There is no dispute as to the judge's self-direction concerning paragraph 276ADE(1)(iii) or (vi). Respectively, those provisions provide that in the event of twenty years' continuous, albeit unlawful, residence an individual is entitled to limited leave to remain and in relation to (vi) that where an individual faces "very significant obstacles to their integration" they are entitled to limited leave to remain on that basis. Additional suitability and eligibility criteria apply but they are not relevant to the issues under consideration in this appeal.

22. Since the grounds of appeal in this case challenge findings of fact reached by the judge it is necessary to recall the Appellate restraint with which such findings should be approached. The jurisdiction of this Tribunal on an appeal lies solely in relation to an error of law and not a disagreement of fact.

23. Certain findings of fact of course are capable of being infected by an error of law, as notably summarised in R (Iran) v The Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. There are many judgments of the higher courts which underline the distinction between errors of fact and errors of law. I can do no better than rely on the oft-quoted judgment of Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:
>
> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> …
>
> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an Appellate Court will only be island-hopping.**"**

24. The judgment in Fage UK Ltd v Chobani UK Ltd is now some eight years old but it continues to represent a useful summary of the law on the approach to findings of fact and the deference owed by appellate tribunals and courts to first instances judges. See also the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5 at [52], which summarised the principles on the constraints on appellate courts and tribunals in these terms; Lady Hale said that those principles:

> "may be summarised as requiring a conclusion that either there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

25. I also refer to Volpi v Volpi [2022] EWCA Civ 464, in which Lewison LJ re-summarised the approach to findings of fact challenged on an appeal. Of significance for present purposes are the following extracts from paragraph 2:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

It is not necessary for present purposes to quote the remainder of that paragraph or any of the remaining paragraphs in Volpi v Volpi concerning the approach to findings of fact reached by first instance judges. It is clear that a high threshold must be passed.

Discussion

26. In my judgment, Judge Oxlade was entitled to reach the findings of fact that she reached for the reasons that she gave. It is necessary to go to [36] of her decision, in which she bases her findings on those previously reached by Judge Shiner. The judge had correctly identified that her finding in that respect amounted to what she described as a "soft starting point" at [13] of her decision, in reliance on BK (Afghanistan) v The Secretary of State for the Home Department [2019] EWCA Civ 1358. The judge correctly identified that Judge Shiner's observations as to the longevity of the appellant's residence in the United Kingdom were not an issue that had been before Judge Shiner and so therefore she, Judge Oxlade, would not take them into account for the purposes of her findings in this appeal.

27. However, the extent to which the appellant was in contact with his family was squarely an issue that was before Judge Shiner, and which was relevant to Judge Oxlade's findings. It was, therefore, appropriate for this judge to take his unchallenged findings of fact on that issue as her starting point. Mr Raza submitted that the findings of Judge Shiner were expressed in somewhat tentative terms. At [44] of his decision, Judge Shiner stated that he found the evidence of the appellant claiming not to be in contact with anybody in Kabul to be "implausible". Then at [46] he underlined those same findings. Those findings were not capable of providing even the "soft starting point" that Judge Oxlade said they were, Mr Raza submitted.

28. In my judgment, Judge Shiner reached those findings of fact having considered the whole sea of evidence in the case before him. This is not an appeal against his decision, which has not been challenged, at least not successfully (I have not been told about any applications for permission to appeal against it, which would not in any event be relevant to my analysis on this occasion). Judge Shiner's unchallenged decision reached findings that were relevant to the very issues Judge Oxlade had to address.

29. It is also important to bear in mind that the insistence of the two witnesses on this occasion that the appellant was not in contact with any of his family in Afghanistan was a matter the judge was entitled to bring her judgment to. Again, it is important not to "island-hop" when engaging in analysis of findings of fact reached by a first instance judge. The judge had set out at [38] a range of steps that she considered the appellant could have taken in order to make contact with his family, which he had not attempted to take. It is clear that when read in the round, the basis upon which the judge reached her conclusion concerning the adverse credibility of the two witnesses and of the appellant was not simply a single sentence in Judge Shiner's decision, but rather her analysis of the entirety of the evidence in the case, in the round.

30. In relation to Mr Raza's submissions that the appellant is expected to prove a negative and that he was somehow disadvantaged by the absence of a Presenting Officer at the appeal before the First-tier Tribunal, I consider that those are disagreements of weight. The judge directed herself concerning the difficulties that those seeking to establish two decades of unlawful residence commonly face. She also factored into her analysis the difficulties the appellant would likely face, having made what she described as a treacherous journey to the United Kingdom in the year 2000. She was aware of those very issues.

31. In relation to the judge's observations at [40] that in other cases there often is evidence of the sort the appellant had failed to produce in this case, I consider she was entitled to bring her special expertise that she has gained from hearing other cases to her analysis of this case. The Tribunal Rules of Procedure applicable to proceedings in the First-tier Tribunal require as a facet of the overriding objective judges to bring their special expertise to the analysis of cases. The fact of the matter is that there was a dearth of evidence of precisely the sort that regularly features in cases of this nature. The judge was entitled to take that factor into account.

32. Recalling that it does not matter the degree of confidence with which an appellate court or tribunal would have reached a different conclusion when reviewing a trial judge's findings of fact, it is my task to consider whether the judge reached findings of fact that no reasonable judge could have reached, or that were unsupported by evidence. I consider that the judge, having heard the evidence of the witnesses, having considered the decision of Judge Shiner and having considered the whole sea of evidence in the case, was entitled to reach the findings she reached, for the reasons she gave.

33. I therefore turn to the remaining ground of appeal relating to very significant obstacles and the fall of Kabul. I accept Mrs Nolan's submissions that the evidence provided by the appellant was by reference to what was known concerning the position in Kabul *at that stage* was insufficient to demonstrate that he would face very significant obstacles to his integration. The sole piece of objective background material that had been provided by the appellant was a printout of a BBC article that featured at page 52 of his bundle. That concerned live reporting from the BBC surrounding the "struggle to evacuate Afghans from Kabul Airport".

34. Whilst the situation in Kabul has now been accepted by the respondent in her *Country Policy and Information Note – Afghanistan: Humanitarian situation*, version 2.0, April 2022 at [1.1.1] to present a general Article 3 risk by the respondent's April 2022 guidance, the task facing this Tribunal is to consider whether the judge erred on the basis of the evidence that was before her. Put simply, there was no evidence before her to merit the only conclusion that Mr Raza contends she was entitled to reach. At the time of the hearing, there was a distinct lack of clarity concerning the implications of the fall of Kabul to the Taliban; while the respondent's understanding of the position has been published in the guidance referred to above, there was precious little evidence at the time, other than conjecture. The appellant did not, for example, seek to demonstrate that the criteria summarised at [66] of E v Secretary of State for the Home Department [2004] EWCA Civ 49 were met, whereby certain mistakes of fact amounting to unfairness may amount to an error of law.

35. I conclude by observing that the Secretary of State had not considered the appellant's case that there was a general Article 3 risk amounted to a "very significant obstacle" for the purposes of paragraph 276ADE(1)(vi). Indeed, she had not considered the Article 3 paradigm at all. Advancing an Article 3 case on that basis may well have been a new matter for which the consent of the Secretary of State would be required for the judge to consider it in any event.

36. The mere fact that the judge, on the basis of the minimal evidence adduced by the appellant in September 2021, did not find that he would face very significant

obstacles to his removal does not amount to a barrier to his being able to make an appropriate application based on the now clarified developments in Kabul.

37. For these reasons the judge was entitled to approach the issue of very significant obstacles in the manner that she did.

38. I therefore dismiss this appeal.

Notice of Decision

The appeal is dismissed.

The decision of Judge Oxlade did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 16 June 2022
Upper Tribunal Judge Stephen Smith