



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/04315/2017**

**Appeal Numbers:  
PA/04806/2017**

**THE IMMIGRATION ACTS**

**Heard at Columbus House,  
Newport  
On 16<sup>th</sup> March 2018**

**Decision and Reasons  
Promulgated  
On 27<sup>th</sup> April 2018**

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**  
Appellant

**and**

**Mr Et A S and Mr Eh A S**  
(ANONYMITY DIRECTION MADE)  
Respondent

**Representation:**

For the Appellant: Mr G Hodgetts, instructed by Duncan Lewis Solicitors

For the Respondent: Mr Richards, Home Office Presenting Officer

**DECISION AND REASONS**

1. I shall refer to the parties as they were described before the First Tier Tribunal that is Messrs S as the appellants and the Secretary of State as the respondent.
2. In a determination dated 6<sup>th</sup> October 2017 the First-tier Tribunal Judge dismissed the appeals on asylum ground and humanitarian protection grounds but allowed the appeals under Article 3 only. He thought the appellants might be destitute in Afghanistan.

3. The appeal involved a 'cross appeal' by Messrs S (two brothers). An application for permission to appeal was made by the Secretary of State on 16<sup>th</sup> October 2017 and granted by First-tier Tribunal Judge Kimnell on 22<sup>nd</sup> November 2017 who stated that it was arguable that 'on the facts found the high threshold for meeting Article 3 was not met'.
4. The appellants however on 20<sup>th</sup> October 2017, had also submitted applications for permission to appeal to the First-tier Tribunal. Unfortunately these applications were not addressed prior to the Secretary of State's application being granted, and were still outstanding by the date of the hearing before me in the Upper Tribunal, which was only on the error of law point raised by the Secretary of State.

### **Applications for Permission to Appeal**

5. The grounds set out by the Secretary of State in her application for permission were essentially as follows
  - (i) inadequate reasoning by the judge to support the finding in relation to Article 3
  - (ii) the correct threshold in relation to Article 3 had not been applied. This was a high threshold as exemplified by N v Secretary of State [2005] UKHL 31.
6. The 'cross' application for permission to appeal by the appellant and which had not been addressed by the First-tier Tribunal set out grounds as follows
  - (i) Having allowed the appeal under Article 3 the judge erred in failing to allow the claim under Article 15(b) (humanitarian protection)
  - (ii) In assessing the risk from Mohammad Atta Noor, (which was central to the appeal) the judge failed completely to take account of the expert evidence of Dr Guistozzi or the relevant material evidence identified in the skeleton argument. This identified that he was indeed a man of influence who was at odds with the family in Afghanistan
  - (iii) The conclusions regarding lack of convention reason was inadequately reasoned
  - (iv) The findings in relation to credibility were unclear - the judge implicitly accepted the appellants' credibility but failed to make sufficient findings in relation to Atta Noor.
  - (v) Paragraph 276ADE did not attract any findings by the judge. That was an error

7. At the hearing, Mr Hodgetts and Mr Richardson both concurred that there was an error of law and that the matter should be returned for a hearing de novo. Mr Hodgetts conceded that there was inadequate reasoning when allowing the appeal on Article 3 grounds. I agree. Mr Richardson, on behalf of the Secretary of State, conceded that there was no reference in the judge's findings on the risk from Atta Noor to the appellants, to the expert evidence. That too was a material error of law.
8. I was referred to **EG and NG (UT Rule 17: withdrawal: Rule 24: scope) Ethiopia** [2013] UKUT 00143 which confirms that the Upper Tribunal cannot entertain an application purporting to be made under rule 24 for permission to appeal until the First-tier Tribunal Judge Tribunal has been asked in writing for permission to appeal and has either refused it or declined. In this instance, no decision had been made by the First-tier Tribunal on the appellants' application for permission.
9. Further to Section 4(1) (c) of the Tribunals Courts and Enforcement Act 2007 I am also a First-tier Tribunal Judge and may 'reconstitute' myself as a First-tier Tribunal Judge although also sitting in an Upper Tribunal capacity. **ZEI and others (Decision withdrawn - FtT Rule 17 - considerations) Palestine** [2017] UKUT 00292 (IAC) paragraph 8 '*the application to the FtT has not been decided and as a judge of the FtT I can decide it*'. Therefore, as an initial stage, acting in a First-tier Tribunal Judge capacity, I considered with the agreement of both parties whether permission should be granted to the appellants on the grounds identified above.
10. I find that it is arguable that the First-tier Tribunal Judge erred in his failure to make clear credibility findings and erred in failing to address the crucial expert and further material evidence in relation to the risk from Atta Noor (grounds (ii) and (iv)). The findings on credibility and the influence of Noor would also affect findings in relation to grounds (i) and (iii). As such I granted permission to appeal to the appellants on all grounds.
11. As a second stage and as part of the Upper Tribunal hearing I found that there were indeed material errors of law in relation to the findings on credibility. The reasoning was simply not clear. At paragraph 32 the judge opined that the case for asylum was 'elegantly phrased but lacking in any substance or merit'. Overall it was the appellants' claim that they were at risk but the judge merely found it 'incredibly tenuous'. He failed, however, with reference to ground (ii) to address the expert evidence when assessing the risk from Noor and made no mention of the video evidence which was played to the Tribunal. I understood that the question of the 'forced

marriage' issue to which the judge devoted paragraphs 23 to 30 muddled the waters with regards credibility and was at best a 'red herring' as it related to the grandfather's approach to support in Dubai rather than risk in Afghanistan. In addition, the father of the two appellants is in the process of claiming asylum in the UK and it was unclear, according to Mr Hodgetts, as to what the judge made of his oral evidence given at his sons' hearing.

12. I find that both parties have demonstrated a material error of law. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington  
2018

Date 16<sup>th</sup> March

Upper Tribunal Judge Rimington