Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: PA/12160/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Reasons Promulgated**
On 19 April 2018	**On 24 April 2018**

Before

Upper Tribunal Judge Kekić

Between

[M K]
~~**(anonymity order not made)**~~

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr K Smyth, Solicitor Advocate, Kesar & Co. Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

Determination and Reasons

Background

1. This appeal comes before me following the grant of permission to the appellant by First-tier Tribunal Judge Hollingworth on 24 February 2018 in respect of the determination of First-tier Tribunal Judge Burns who dismissed the appeal by way of a determination dated 17 January 2018.

2. The appellant claims to be a citizen of Afghanistan born on [ ] 1984 but his nationality is disputed by the respondent. He claims to have arrived in

2007 having travelled from France in a lorry. Whilst in France, he had been fingerprinted, had given a different identity and claimed to be a Pakistani national. He claimed asylum in the UK in August 2015 after he was arrested.

3. On 16 November 2017 the respondent refused his asylum and human rights claim. His appeal against that decision came before Judge Burns at Taylor House on 20 December 2017. The judge heard oral evidence from the appellant and from his partner, Ms [D]. The appellant claimed that he would be at risk on return because his father had converted from Sunni to Shia Islam and that he (the appellant) had been raised as a Shia Muslim in Pakistan where the family had moved to in 1990.

4. Judge Burns was not impressed with the appellant's evidence. She was not satisfied that he was an Afghan national and found that he was more likely to be a Pakistani. In any event, she found there was a significant Shia Muslim minority in Afghanistan and that whilst they faced discrimination, this did not amount to persecution. She also took account of his delayed asylum claim and the failure to claim asylum in France or in any other safe country he passed through on his way to the UK.

5. Judge Burns also heard evidence on the article 8 claim from the appellant and Ms [D]. She had regard to the documentary evidence and concluded that whilst there had been a relationship in the past, it was no longer subsisting and the appellant was no longer cohabiting with Ms [D] in a relationship akin to marriage.

6. The appellant challenged the decision and, as stated above, permission to appeal was granted. The challenge was on article 8 grounds only; there has been no challenge to the judge's findings on the asylum claim.

7. Two criticisms were made. First, it was argued that the judge had failed to give reasons for why the other supporting evidence (statements from Ms [D]'s two adult children and a friend) were discounted. Secondly, it is maintained that when appellant said that Ms [D]'s son, [A], lived with them (thereby contradicting Ms [D]'s evidence that he did not but came to visit occasionally), he meant that [A] stayed with them. It is argued that the judge incorrectly recorded the appellant’s evidence and indeed had omitted to record that the appellant had said [A] "*slept on the settee*" which it is maintained was recorded in the representative's notes of the hearing.

Appeal hearing

8. The appellant was in attendance at the hearing. The grounds were expanded upon by Mr Smyth in oral submissions at the hearing before me. He confirmed that the only challenge was to the article 8 aspect of the determination. He submitted that the judge had accepted that the appellant had cohabited with Ms [D] in the past although she found that the relationship was no longer subsisting. He submitted that the judge

had made no findings on the supporting letters. There was now also a letter from Ms [D]'s sister. The judge failed to make clear findings on this evidence.

9. Mr Smyth also argued that there had been a discrepancy over the colour of a pet cat. The appellant had said it was white and Ms [D] said it was black. The appellant was recalled and this matter was put to him. He said he had been muddled. Mr Smyth said this was possible. The sponsor had never owned a white cat and so this was an innocent mistake by the appellant. The neighbour's cat was white.

10. The next problem was concerned with the living arrangements of the sponsor's older son, [A]. It was not correct that, as the appellant said in evidence, [A] lived with them. However, in his witness statement the appellant had said that [A] sometimes came and stayed. The appellant's complaints went beyond a mere quibble. The judge had not recorded the appellant's evidence that [A] slept on the settee. This was indicative of someone visiting rather than living there. This was a material omission.

11. At this stage I paused Mr Smyth in his submissions in order to check the judge's Record of Proceedings. Whilst I found reference to [A] sleeping in the loft, there was no record of the appellant stating that he slept on the sofa. Mr Wilding checked the Presenting Officer's notes of proceedings and also found no record of such evidence.

12. Mr Smyth then conceded he could not take that point further but maintained that [A] only visited and did not live there. He pointed to the evidence of the other children confirming that the appellant lived with their mother. He submitted that the discrepancies in the evidence were insufficient to undermine the other supporting evidence particularly when no findings on it had been made.

13. Mr Wilding replied. He relied on the Rule 24 response and submitted that the appellant's grounds were a disagreement with the outcome. The findings were open to the judge to make. The appellant was even recalled to explain the discrepancy that had arisen between his evidence and that given by Ms [D]. The judge was plainly aware of all the evidence. The case came down to an attempt by the appellant to reargue the findings rather than identifying any errors. The appellant had failed to explain how he had become confused. The judge carried out an assessment and made sustainable findings. There was nothing wrong with the determination, let alone materially wrong.

14. In response, Mr Smyth submitted there were several letters on which no findings were made. The letter from one of the sponsor's children went beyond the "*friendly attitude*" cited in the determination. The error was a failure to make findings on crucial witness evidence and was therefore material.

15. That completed the submissions. At the conclusion of the hearing, I reserved my determination which I now give.

Findings and Conclusions

16. I am grateful to both sides for their submissions. I have taken these into account along with all the other evidence including the determination of the First-tier Tribunal.

17. The judge's findings were not based solely on the two discrepancies identified by the appellant in the grounds and expanded in submissions before me. The judge noted that the appellant gave vague and incorrect details about the studies of Ms [D]'s triplets. Had he continued to be involved with the family for the last 9 years as claimed, he could be expected to be aware of these details. The refusal letter also notes that at interview the appellant was unable to give the name of the school the three children attended during the time when he was supposed to be living with the family.

18. The judge found that the appellant's evidence conflicted with that given by Ms [D] as to where her son, [A], lived. The appellant claimed he lived with them. Ms [D] said he did not, although he came to visit and sometimes stayed over.

19. Mr Smyth offered two possible explanations for this discrepancy. One was that the appellant was confused over the meaning of "*living*" and "*staying*" and the other was that the judge had omitted to record his evidence that [A] slept on the sofa which accorded with what a visitor might do. There are difficulties with both explanations. With regard to the first, I have not seen any evidence from the appellant to suggest that this was his evidence. It may well be something his representatives have thought of; it is certainly not suggested anywhere that it was the appellant who put forward this explanation. There is no evidence to support the submission that there were language difficulties at the hearing and I note that not only did the appellant give his oral evidence in English without any issues of comprehension but that he also chose to speak in English at his asylum interview and prepared a detailed witness statement without the use of an interpreter. Indeed, in his statement he maintains that he was taught English at school and so knew the language before he even came here. This confirms a fluency in English. In this context, Mr Smyth's submission about the appellant's confusion over "*living*" and "*visiting/staying*" is just not plausible.

20. The difficulty with the second explanation is that although the representative who appeared for the appellant at the hearing before the First-tier Tribunal maintained that the appellant had said that [A] slept on the sofa, neither the judge's record nor that of the Presenting Officer has a note of that evidence having been given. In fact, the judge's record clearly notes that the appellant said that [A] slept in the loft. It may be that in his witness statement the appellant stated that [A] did not live

with them but this does not explain why he should then give an incorrect answer at the hearing. It is possible that having prepared a false statement, he had forgotten what he said therein. It has not been shown that there was a failure by the judge to correctly record the appellant's evidence.

21. Much was made about the discrepancy over the colour of Ms [D]'s pet cat. However, this was just one factor cited by the judge and it was open to her to conclude that if the appellant had cohabited with Ms [D] since 2009, he would not have become confused over whether the cat, who had also been living in the house for all that time, was black or white. Mr Smyth argued that as it had been accepted that they had been in a relationship at an earlier time, the appellant would have known the colour of the pet and, therefore, his incorrect answer was just an innocent mistake. I find it is equally plausible that he had moved out, as the judge found, and had forgotten the colour of the animal. Although Ms [D] sought to offer an explanation when the discrepancy became apparent and maintained the neighbour's cat was white, this was not an explanation offered by the appellant and, if he was indeed part of the family, he could be expected to correctly answer such a simple question, particularly as it was also Ms [D]'s evidence that no other animal came in to her home.

22. Contrary to what was argued, the judge did have regard to the supporting statements. It is incorrect to refer only to paragraph 51. The judge addressed the other evidence at paragraphs 40-43 and indeed accepted that the appellant had a good ongoing relationship with Ms [D]'s adult children. Clearly, however, there were difficulties with the evidence that undermined the strength of the contents of the statements and it must be borne in mind that none of those who prepared the statements attended the hearing to give oral evidence and to be cross-examined. The judge also plainly found that notwithstanding the written evidence from two of the five children, the discrepancies suggested that the relationship between them was not as close as was claimed. Findings have therefore been made on the supporting evidence. There was no need for the judge to itemise and make findings on every item of evidence. She has made it clear why should dismissed the appeal and has provided adequate reasons for her conclusions. Mr Smyth referred to an additional letter from Ms [D]'s sister however this was not before the judge and cannot be used to undermine the judge's findings at this stage.

23. The judge was entitled to conclude that the appellant would not have made basic mistakes if he was still living with Ms [D]. The judge rather generously, in my view, found that there had been a relationship in the past but that it was not ongoing. That conclusion was a reasoned one and open to her on the evidence.

24. It is, of course, correct that the article 8 claim must be assessed in the context of all the evidence as Mr Smyth submitted. That, the judge has done. Part of that evidence is the fact that the appellant has not sought

to challenge the judge's finding that he made a bogus asylum claim and that he was not an Afghan national as claimed. His lack of credibility in that respect inevitably taints his evidence on other matters and even calls into question his claimed identity. His conduct in entering illegally, working unlawfully and making no asylum claim until his arrest are also relevant factors.

25. Importantly, however, what the grounds fail to engage with and what Mr Smyth did not address in his submissions, was the fact that the judge also considered the appeal on the basis that there was an ongoing relationship (at paragraph 53-59). Even if the errors relied upon by the appellant were, therefore, made out, which they are not, they would be immaterial because the judge considered the appeal at its highest on article 8 grounds. No challenge is made to the judge's findings in this regard. On that basis alone, the article 8 claim cannot possibly succeed and this challenge is doomed.

Decision

26. The First-tier Tribunal Judge did not make errors of law. The decision to dismiss the appeal stands.

Signed:

Dr R Kekić
Judge of the Upper Tribunal 23 April 2018