



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

Appeal Number: HU/09599/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22<sup>nd</sup> February 2019**

**Decision & Reasons Promulgated  
On 11<sup>th</sup> March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAINI**

**Between**

**A. A.  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr I Khan, Counsel

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION BY CONSENT AND DIRECTIONS**

1. Pursuant to Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and by the consent of the parties, the following order is made:
  - (i) Upon the parties' agreement that the decision of the First-tier Tribunal promulgated on 5<sup>th</sup> October 2018 discloses a material error of law, it is hereby ordered by consent as follows.
  - (ii) The First-tier Tribunal Judge made errors of law in relation to the complaints made in the first Ground of Appeal drafted on behalf of the

Secretary of State in the following respects as agreed between the parties today:

- (a) In considering the new matter of the Appellant's Christian faith as raised previously by the Appellant's representatives which resulted in the adjournment of the previously listed hearing on 20<sup>th</sup> June 2018 and resulted in the Appellant's solicitors' letter sent to the Respondent on 3<sup>rd</sup> July 2018 seeking consent for that matter to be considered by the First-tier Tribunal pursuant to Section 85(6) of the Nationality, Immigration and Asylum Act 2002, and further to the Presenting Officer's stance before the First-tier Tribunal on 26<sup>th</sup> September 2018 that consent was withheld, it is agreed by the parties that the judge erred in considering the new matter under Section 85(5) and Section 85(6) of the 2002 Act as; whether or not there were special circumstances, and, whether or not it was unreasonable of the Secretary of State to refuse consent for this new matter to be considered, whilst the Secretary of State had indicated that he refused consent for the matter to be considered, as observed by the Upper Tribunal in *Mahmud (s..85 NIAA 2002 - new matters: Iran)* [2017] UKUT 488 (IAC), specifically at [40], the reasonableness or not of the Secretary of State in withholding consent for the First-tier Tribunal to consider a new matter can only be challenged by way of judicial review proceedings.
- (b) There is no power for the First-tier Tribunal, or the Upper Tribunal to determine whether the Respondent has appropriately or fairly withheld consent, which is a matter that is open to an Appellant to challenge by way of a judicial review claim on public law grounds. Albeit the construction of Section 85(5) and (6) may result in scenarios whereby the Tribunal cannot consider new matters because the Secretary of State has not given consent to do so, which may be relevant or germane to the proportionality of a human rights appeal (as was the case here), this is a matter which is beyond the remit of the First-tier Tribunal and Upper Tribunal given the peculiar construction of the 2002 Act and the power given to the Secretary of State to withhold consent to a new matter being considered by the Tribunal, even though this may give rise to unreasonableness or unfairness or irrationality, as the case may be.
- (c) Mr Walker was not without sympathy for the Appellant given that the Respondent had an explicit opportunity and the matter had been adjourned so that the Respondent could consider the new matter raised by the Appellant in terms of his Christian faith and the viability of his return to Afghanistan, and quite rightly so.
- (d) As a consequence, the parties invited me to make a direction in respect of the need for the Secretary of State to give attention to this matter and to reach a firm written view as to whether or not

he withholds consent to the new matter being considered, no later than three weeks before the remitted hearing.

(e) I add that should there be any failure to do so on yet a further second opportunity being given to the Respondent to consider the new matter, given the inconvenience and expense that the Appellant has been unnecessarily put to as a consequence of the Respondent's failure to make a formal written decision in this matter as to whether or not to give consent to the new matter being considered, pursuant to the Appellant's representatives letter of 3<sup>rd</sup> July 2018, such further failure would likely have costs consequences for the Respondent.

(iii) As a consequence of the above agreed error, the decision is set aside in its entirety and is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.

2. The Secretary of State's appeal to the Upper Tribunal is therefore allowed.
3. The decision of the First-tier Tribunal is set aside for legal error by consent.

### **Directions**

4. I make the following directions for the continuation and remitted hearing that is to shortly follow before the First-tier Tribunal:
  - (i) The appeal is to be remitted to IAC Hatton Cross.
  - (ii) A Dari interpreter is required.
  - (iii) The Appellant and the Reverend are to be called once more as witnesses.
  - (iv) The time estimate given is two hours.
  - (v) I direct that the Secretary of State indicate whether he consents or objects to the new matter being heard by the First-tier Tribunal, along with reasons for that decision, no later than three weeks prior to the date of the remitted hearing. The Respondent's decision and reasons are to be filed with the First-tier Tribunal and served upon the Appellant in accordance with that time period.
  - (vi) The remitted appeal is not to be listed before six weeks from the date of promulgation of this decision.
5. Anonymity direction hereby made at the parties' request.

**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

Date

Deputy Upper Tribunal Judge Saini