Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **PA/09601/2019 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 11 August 2020	**On 17 August 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AP
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to directions issued by Upper Tribunal Judge Smith on 23 March 2020 and by Upper Tribunal Judge Macleman on 2 July 2020.

2. The appellant is a national of Afghanistan born on 27 March 1997. He claimed asylum in 2012 shortly after arriving in the UK. His claim was refused but he was granted discretionary leave to October 2014 as an unaccompanied minor. His application for further leave was refused in October 2015 and he unsuccessfully appealed against that decision, eventually becoming appeal rights exhausted on 11 April 2017. He made further submissions on 19 July 2019 which were refused on 6 September 2019 with a right of appeal. That appeal was heard by First-tier Tribunal Judge Callow on 21 November 2019 and

was dismissed in a decision promulgated on 17 January 2020. It is that decision that the appellant now seeks to challenge.

3. The appellant's original claim was made on the basis of a fear of return to Afghanistan as a result of having fled the country after being held by the Taliban with the purpose of training him to become a suicide bomber and escaping from their camp in the mountains. In dismissing the appellant's appeal against the respondent's decision refusing that claim, First-tier Tribunal Judge Froom found the entire account to be a fabrication and concluded that the appellant could safely return to Afghanistan where he was not at risk and where his family remained.

4. The appellant's further submissions made on 19 July 2019 were on an entirely different basis, namely his fear of return to Afghanistan on account of his decision to disassociate himself from the Muslim religion. He claimed to have had a religious Muslim upbringing in Afghanistan but to have changed his views on Islam as a result of having been placed in foster care in the UK with a Christian family. He had not converted to Christianity but believed himself to belong to no religion and to believe only in humanity. He did not express his views openly and he would not be able to do so in Afghanistan as he would be at risk as an apostate, a crime which was punishable by death. He would be killed or tortured in Afghanistan and would be considered as a spy of the West.

5. The respondent, in refusing the appellant's claim, did not address the appellant's claim in regard to his religion but considered whether he would be at risk in Afghanistan as a result of being westernised, concluding that he would not and that he could safely return to that country.

6. The appellant's appeal against that decision was dismissed by Judge Callow in the First-tier Tribunal. The appellant did not give oral evidence at the hearing, in light of a report from a senior clinical psychologist, Dr K Bentham, concluding that his ability to give evidence was compromised by the fact that he was suffering from C-PTSD. Reliance was instead placed upon his witness statement submitted with his appeal bundle. Judge Callow made some adverse credibility findings against the appellant and found that he would not be at risk on return to Afghanistan.

7. Permission to appeal was sought by the appellant on the grounds that the judge had made adverse credibility findings without clarifying which evidence he rejected and why; and that the judge, having made findings that he no longer associated with Islam and was afraid of so declaring and that it was not safe for him to express his disassociation with Islam in Afghanistan, had erred by failing to follow through and allow the appeal in line with the guidance in HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 in light of the background information on the penalties for apostacy. It was asserted also that the judge had erred by not accepting that atheism was a protected belief under the Refugee Convention.

8. Permission was granted on 17 February 2020 and the respondent filed a rule 24 response on 4 March 2020 opposing the appellant's appeal.

9. The matter was listed for hearing in the Upper Tribunal, but was adjourned in light of the need to take precautions against the spread of Covid-19. The case was then reviewed by Upper Tribunal Judge Smith who, in a Note and Directions sent out on 23 March 2020, indicated that she had reached the provisional view that the question of whether the First-tier Tribunal's decision involved the making of error of law and, if so, whether the decision should be set aside, could be made without a hearing. Submissions were invited from the parties. In the absence of any response to the directions from either party, further directions were issued by Upper Tribunal Judge Macleman on 2 July 2020 in similar terms but providing the parties with an extension of time in which to make submissions.

10. Submissions were received from Mr Clarke for the respondent on 8 July 2020 and were also emailed to the appellant's solicitors the same day. However there has been no response to the directions from the appellant or his solicitors, despite the extension of time and further directions. In his submissions, Mr Clarke resisted the appellant's appeal and requested that the judge's decision be upheld. He had no objection to the matter be determined without a hearing.

11. I have considered whether it would be just and fair to proceed to make a decision in this case without a hearing, even without notification of an objection from the appellant. I have decided that it would. The appellant has failed to respond to directions on two occasions. The directions were sent initially by first-class post to the appellant himself as well as to his solicitors on 23 March 2020 and subsequently by email to his solicitors on 2 July 2020. In addition, Mr Clarke's submissions, which set out the Tribunal's directions, were emailed to the appellant's solicitors on 8 July 2020. It is clear that the directions were properly served on the appellant. Given the lengthy period of time since the directions were first made, I cannot find that the general circumstances relating to coronavirus provide any justification for the failure to respond. There has been plenty of opportunity for the appellant to reply to the directions and to voice any objection to the matter being determined in the papers. In addition, the decision I make is one which benefits the appellant in any event, to the extent that I set aside the judge's decision dismissing the appeal, albeit without preserving any of the findings. In the circumstances I do not consider there to be any unfairness in my proceeding to determine the matter without a hearing.

12. The main ground of challenge is that the judge, having found that the appellant was an apostate and feared to declare so, ought to have allowed the appeal following the steps set out in the guidance in HJ (Iran), when considering the background evidence which showed that apostates and atheists were subjected to persecution, and that he failed to give proper reasons for not doing so. However, I do not consider that the judge made findings in such clear terms and indeed it seems to me that the judge's findings were particularly unclear. The judge found the appellant's claim to lack credibility. The grounds acknowledge that adverse credibility findings were made and the first ground asserts that the judge erred by failing to make clear which parts of the claim lacked credibility and failing to explain which parts of the appellant's statement

were not accorded weight. Accordingly, it is not the case, in my view, that the judge unequivocally accepted the factual basis of the claim but dismissed the appeal on the question of risk on return. To the extent that the grounds suggest that he did, I find that they lack merit.

13. The lack of clarity in the judge's credibility findings is demonstrated by the fact that the respondent, in the rule 24 response at [6], submitted that the judge accepted that the appellant had distanced himself from Islam but not for the reasons stated, whereas Mr Clarke in his submissions appears to have considered the adverse credibility findings to relate only to how the appellant would behave in Afghanistan. My own view is that it is difficult to understand what the judge's findings were at all, at {23], and it seems that UTJ Macleman, at [5] of his directions, was expressing similar misgivings.

14. At [24] the judge expressed concerns about the credibility of the appellant's claim and at the end of [23] he concluded that a personal witness statement alone was not sufficient to establish the claim. When considering that the witness statement from the appellant was the only evidence of his claim, and when considering the judge's findings at [17] that there was no good reason why the appellant had not given oral evidence, it is difficult to understand whether the judge, in the remaining part of [23], was indeed accepting the appellant's claim to have renounced his faith and to fear expressing that openly in Afghanistan, and if he was, why he did so. I am entirely in agreement with the suggestion, in UTJ Macleman's directions, that the judge's findings at [23] and [24] are inconsistent and irreconcilable. To the extent that the findings at [23] are relied upon by the appellant as including positive credibility findings about his (lack of) religious beliefs and how and why he would desist from expressing those beliefs, I find those findings to be simply unsustainable. I therefore reject the appellant's second ground of appeal, but consider that the merits of his challenge to the judge's decision lies in the assertion in the first ground, at [4] and [5], in regard to the findings of fact.

15. In view of the unsustainability of the judge's findings of fact, the only appropriate course is for the case to be remitted to the First-tier Tribunal to be heard *de novo* before a different judge, with no findings of fact preserved.

DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and the decision is set aside. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard afresh before any judge aside from Judge Callow.

Anonymity

The First-tier Tribunal made an order for anonymity. I continue the order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede
Upper Tribunal Judge Kebede

Dated: 11 August 2020