



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12497/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
at Field House
On 6th November 2020

Decision & Reasons Promulgated
On 1st December 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**MM
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel instructed by Times PBS Ltd
For the Respondent: Mr S Walker, Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal Broe (“the judge”) promulgated on 27th March 2020 dismissing the appeal of MM (“the appellant”).
2. The appellant is a citizen of Afghanistan born in 1988. He arrived in this country on 11th September 2018 and made an asylum claim on 2nd October 2018. This was refused on 16th December 2019. I summarise the appellant’s asylum claim. He was born in Logar Province of Afghanistan and is of Pashtun ethnicity. From April 2009 until July 2014 he worked for Karim Hayat Logistics Company in Kabul as a drivers’ supervisor. In November 2013 he volunteered to join the team of Dr Ashraf Ghani, a politician who was standing in forthcoming elections. The election campaign began around February 2014.
3. In March 2014 his father received a telephone call from Alam Din, a distant relative and a member of the Taliban. The appellant was threatened that if he did not give up his work he would be killed. Three months after the telephone call the Taliban sent a letter requesting the appellant again to stop his work for the company. This and the earlier threats had been reported to the police.
4. The second round of the elections in the meantime took place on 14th June 2014. The election was between Dr Ghani and his political rival, Abdullah Abdullah. The following day the appellant tried to prevent a group of armed men from swapping ballot boxes with others filled with fraudulent votes. The appellant maintains that Hamza, a senior colleague, told him not to interfere and a fight broke out. The appellant and others managed to stop the swapping of the boxes. The appellant then found out that Hamza had been bribed. Hamza and the armed men threatened to kill the appellant. Hamza and two other men were arrested but were later released after two days’ detention. Hamza threatened revenge on the appellant. On 24th July 2014 the appellant was involved in a car crash with another vehicle which he says deliberately tried to force him off a cliff. The appellant called the police, after which he received a further threatening call from Hamza. Fearing for his safety, both from the Taliban and Hamza (and from his political party, the Jamaat-e-Islami) the appellant’s family arranged for his departure from Afghanistan. He travelled through several other countries including Turkey, where he remained for some time.
5. Whilst in Turkey Alam Din was killed by the authorities. Alam Din’s family believed that the killing had been based on information provided by the appellant. The Taliban indicated that it would take revenge on the appellant for the death of Alam Din. His father’s car was attacked in Kabul and a week later the family fled Afghanistan for Pakistan. The appellant eventually entered the in the back of a lorry in 2018 and claimed asylum.
6. The respondent did not accept that the appellant worked for Karim Hayat Logistics Company or that he had any problems with the Taliban. The respondent did not accept that the appellant worked in an election campaign or that he had problems with Hamza or Abdullah’s men. The respondent refused the applicant’s protection

claim. The appellant appealed this decision pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002.

The judge's decision

7. The judge heard oral evidence from the appellant. The judge indicated that account had been taken of the evidence before the Tribunal, including letters purportedly issued by the Karim Hayat Logistics Company, and noted that the agreed issues were credibility and risk on return. The judge summarised the oral evidence and referred to photographs provided by the appellant. One of the photographs appeared to show the appellant standing by the open door of a car. Other photographs showed what appeared to be the same car at the bottom of a cliff, upturned.
8. The judge's credibility findings are contained from paragraphs 25 onwards. The judge first considered the appellant's claimed fear from the Taliban based on his employment. One of the letters provided by the appellant in support of his employment was dated 1st September 2012 and was headed 'Letter of Appreciation', the other was dated 15th October 2014 and addressed 'To Whom it May Concern'.
9. The judge found the content of the earlier letter to be surprising given that the appellant remained with the same company until 25th July 2014, but then noted that it did coincide with the appellant's move to another position within the company. The judge observed that the letters were sent to the appellant when he was in Turkey at the end of 2014 although the appellant last had contact with the company in 2015.
10. At paragraph 27 the judge was not satisfied that the appellant had explained why the letters were sent to him. The judge speculated that it may have been because the appellant wanted them as evidence in support of an asylum claim. The judge observed that the letters did not refer to the reason why the appellant's employment ended. The judge found that the letters had different signatures although, according to the judge, they were purportedly signed by the same person. It was surprising to the judge that the appellant had not provided more recent evidence from the company addressing the issues raised in the Reasons for Refusal Letter, particularly given that the company's telephone number and email address were provided. Having cumulative regard to these factors, the judge expressed concern as to their reliability and attached limited weight to the letters.
11. The judge then considered the appellant's claimed fear from supporters of Abdullah Abdullah or Hamza. While acknowledging that the appellant provided a 'letter of appreciation' from a general in charge of Dr Ghani's 'Change and Continuity Team', nothing more recent had been provided in support of the appellant's involvement as a supporter of Dr Ghani in the election.
12. At paragraph 29 the judge summarised the appellant's description of how he and his friends, including Ahmed, confronted Hamza and how "those higher up than us reported it" to the police. In paragraph 30 the judge stated as follows:

“On the appellant’s account it is clear that others were involved in the Hamza incident. Hamza knew the appellant and I find it likely that he would have known Ahmed, the appellant’s other friends and the people higher up who reported the matter to the police. He has not suggested that anyone else was targeted by Hamza or anyone acting on his behalf. I find it very unlikely that the appellant would be singled out for vengeance. He was not the only person involved in stopping the ballot rigging. He was not the most senior nor was he the one who reported the matter to the police.”

13. Then, at paragraph 31 the judge stated:

“As evidence of the car crash the appellant provided various photographs of a vehicle before and after the incident. There is only one photograph connecting him to the vehicle. Much of it is faded but the appellant appears in bold colour. He appears to be standing next to the car with his arm on top of an open door yet his posture is of a person sitting against something which is not there. His feet are in front of his body in a position I find to be impossible if he is standing. There are no shadows from him. I am satisfied that this is not a genuine photograph and I find that its use significantly undermines the appellant’s credibility. It also limits the weight I can attach to the other photographs and the documentary evidence on which the appellant relies.”

The judge proceeded to draw an adverse inference from the appellant’s failure to claim asylum in a safe third country.

14. From paragraph 33 onwards the judge considered an expert report prepared by Dr Giustozzi. At paragraph 34 the judge considered and recorded extracts from Dr Giustozzi’s report. Dr Giustozzi found that, on the basis of the appellant’s claim being true, he was likely to be on a Taliban blacklist and would remain at risk even through the passage of time. Dr Giustozzi considered that the appellant would be at risk of harassment and discrimination in the future in respect of his political involvement but that in respect of any personal threat from Hamza this would depend. The expert found that Hamza will be more motivated to take revenge against the appellant but it will depend also on the context, that is whether he would consider it possible to take revenge without being exposed to a level of risk.
15. At paragraph 36 the judge stated: “I note that the appellant has not raised the issue of his mental health and Dr Giustozzi does not appear to have any qualifications in that area. It is not clear what he is comparing Hamza with when he says he will be more motivated.”
16. At paragraph 37 the judge said he found the appellant to lack credibility for the reasons he had already given and rejected the appellant’s account. Whilst acknowledging Dr Giustozzi’s expertise, the judge found that the expert’s opinions were based on the appellant’s claim which the judge had rejected as lacking credibility. The judge concluded that the appellant had not established that he had a genuine fear of persecution. The judge proceeded to consider the older country guidance case **AS (Safety of Afghanistan)** and concluded that the appellant would not face a risk of serious ill-treatment if returned to Kabul and that it was a place where he could reasonably be expected to relocate.

The challenge to the First-tier Tribunal's decision

17. There are essentially two limbs to the grounds of appeal. The first limb challenges the judge's findings in respect of his fear from the Taliban and his claimed employment that caused him to be targeted by the Taliban in the first place. This ground challenges, in particular, the basis upon which the judge attached little or no weight to the two letters purportedly issued by the Karim Hayat Logistics Company. None of the points concerning the employment letters were actually put to the appellant by the judge or by the Presenting Officer. The appellant was therefore deprived of the opportunity of dealing with these concerns. The judge, it was said, unreasonably assumed that both letters were sent to the appellant after he left the country and the judge, in any event, failed to ask whether this was the case. The judge made an assumption as to why the letters were provided but did not actually ask the appellant when this could have been done. The judge was, in any event, wrong in concluding that the letters were from the same person. The name on the first document was 'Abdul Wahid Aryobi', whereas the name on the second letter was 'Abdul Alim Aryobi'. Both individuals held different positions within the company. The writer of the first letter was 'CEO' whereas the writer of the second letter was 'M. Director' (I assume to mean Managing Director). To the extent that the judge thought they were written by the same person, account was taken of an irrelevant consideration. The judge erred in drawing an adverse inference from the fact that no more recent documents or information had been provided from the company as, according to the grounds, the company had closed down some time previously. Although the grounds make a factual assertion unsupported by evidence it does not appear that the appellant was ever asked about the continued existence of the company or why no further documents had been obtained. The grounds continue to take issue with the judge's assessment of the evidence of the expert but for reasons that will become apparent I do not need to consider that aspect of the challenge.
18. The second limb of the grounds takes issue with the judge's findings in relation to the appellant's involvement in the election. The judge found that there had been a photographic forgery but failed to put this concern to the appellant. The judge had not indicated any special expertise in the field and the appellant strongly challenged the finding that the photograph had been doctored. Other challenges within the second limb contended that the judge wrongly asked whether it was likely that Hamza knew the appellant's friend Ahmed whereas the judge should have asked whether it was reasonably likely that Hamza did not know Ahmed.
19. Permission was granted on all grounds.
20. At the outset of the 'error of law' hearing I expressed my initial concerns to Mr Walker that the judge may not have taken into account arguably material differences between the letters and that the judge had not at any stage raised concerns that the photograph showing the appellant standing by the door of the car may have been doctored. Mr Walker acknowledged that many of the judge's findings were speculative and that some of these speculative findings had simply not been put to the appellant or his representative. Mr Walker, very fairly but also very properly,

conceded that material mistakes had been made. He was right to do so. In those circumstances it was not necessary to hear any submissions at length from Mr Bazini.

Discussion

21. I am satisfied that the judge materially erred in law when assessing the appellant's credibility. When assessing the appellant's claimed fear of the Taliban the judge appears to draw an adverse inference because the appellant failed to explain why two letters purportedly issued by his former employer, Karim Hayat Logistics, were sent to him. The judge speculates, reasonably I should add, that the appellant may have wanted the letters for the purposes of claiming asylum, and the fact that he did not claim asylum whilst in a safe third country could legitimately be held against the appellant (which the judge does at paragraph 32 of the decision). But the letters may also have been for other purposes. At paragraph 26 the judge observed that the first letter coincided with the appellant's move within the company. In his grounds of appeal Mr Bazini suggests that the second letter may have been obtained for future employment opportunities. That of course is also speculative, albeit with a rational basis. The point is that the appellant was not given an opportunity to provide an explanation. Whilst the judge's inference was reasonable, it was not the only inference that could be drawn, and, in these circumstances, it was procedurally unfair to draw an adverse inference when the appellant was not asked to provide an explanation.
22. The judge also draws an adverse inference based on different signatures that the judge believed were supposed to have been written by the same person. This serious allegation was not put to the appellant and the failure to do so constitutes a procedural impropriety. It is apparent from paragraph 17 of this decision that the names on the letters were not the same and the position held by the individuals who signed them were not the same. The judge failed to take into account these relevant considerations or took into account and gave weight to irrelevant matters. The judge additionally drew an adverse inference from the absence of more recent evidence from the company in circumstances where the appellant was simply not asked why there had been no more recent evidence. The appellant was not made aware of the judge's concerns and not given the opportunity to respond to these concerns.
23. In relation to the appellant's claimed fear from Hamza and the Jamaat-e-Islami, the political party to which Hamza belonged, I find that the judge drew an adverse inference relating to the attack on the appellant's car based on a belief that the photograph showing the appellant next to a car had been doctored. The judge found that this significantly undermined the appellant's credibility, which limited the weight that the judge was able to attach, not just to the photographic evidence but to "the documentary evidence on which the appellant relies". This serious allegation was never put to the appellant. He was never made aware of the judge's concerns and never given the opportunity to comment on those concerns. This constitutes serious procedural unfairness. It also affected the judge's assessment of other documentary evidence including the letter purportedly written by the general in charge of the 'Central Zone Change and Continuity Team' under the leadership of Dr Mohammed Ashraf Ghani. There was no specific finding in respect of this letter but,

if genuine, it would support the appellant's claimed involvement as an election observer for Dr Ghani.

24. At paragraph 30 the judge finds it likely that Hamza would have known Ahmed, the appellant's other friends, and the people higher up who reported the matter to the police. The appellant did not suggest anyone else was targeted and the judge finds it very unlikely that the appellant would have been "singled out for vengeance" because he was not the only one involved in trying to stop the ballot rigging, he was not the most senior person involved, and he did not report the matter to the police himself. These observations were speculative, particularly in relation to whether Hamza knew the names of the other people acting as election observers. Moreover, the judge should have asked whether it was reasonably likely that Hamza would not know Ahmed rather than whether it was likely that Hamza knew Ahmed. I find this constitutes a misdirection by the judge.
25. For the reasons given above I am in no doubt that this decision is unsafe and that it contains material legal errors requiring it to be set aside. Having heard brief submissions from Mr Walker and Mr Bazini, I am satisfied, given the absence of sustainable findings, that this matter needs to be remitted back to the First-tier Tribunal to be decided afresh by a judge other than Judge of the First-tier Tribunal Broe.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Broe.

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 his 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.

D. Blum

20 November 2020

Signed

Date

Upper Tribunal Judge Blum