



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

THE IMMIGRATION ACTS

**Heard at Field House
On 20 June 2013**

**Determination
Promulgated
On 21 June 2013**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SAKHEZADA NAMYAILAI

and

SECRETARY OF STATE

Appellant

Respondent

Representation:

For the Appellant: Ms A Redford, of counsel, instructed by Malik & Malik,
solicitors

For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Afghanistan born on 11 May, 1970. He arrived in this country on 11 August, 2001 and applied for asylum. He

was removed to Austria in March 2002 on third country grounds. He returned to the UK on 7 May, 2002 making an application in a false identity. He was again removed to Austria on 17 June, 2002. He returned on 26 August 2002. A fresh application for asylum was made in September 2007 which was refused in 2008. Further representations were made which were refused in August 2012 on article 8 grounds only. Following judicial review proceedings and a consent order on 13 February, 2013 the appellant's asylum claim was accepted as a fresh claim. However the claim was refused on 27 February, 2013.

2. The appellant appealed the refusal and his appeal came before a First-tier Judge on 15 April, 2013. The judge found that the appellant's conduct in pursuing an asylum claim fabricated by his solicitor severely undermined his credibility. In 2002 his pursuit of another asylum claim under a false identity served to deprive him entirely of credibility and the judge could accordingly attach no credence to the appellant's asylum claim as currently presented.
3. The appellant's wife and children were in Pakistan. The judge did not exclude the possibility of the appellant resuming his private life in Afghanistan. His wife and children were living in Pakistan with the appellant's father-in-law and it would be reasonable to approach article 8 on the basis that the appellant could resume if he chose his family life with his wife and children in Pakistan and his father-in-law's home in that country. The appeal on asylum, humanitarian protection and human rights grounds was dismissed.
4. There was an application for permission to appeal and permission was granted by First-tier Judge Chohan on the basis that the judge had not considered the appellant's core asylum claim. The judge had arguably found the appellant not to be credible based simply on his poor immigration history but he should have dealt with the substantive asylum claim and given reasons.
5. Counsel submitted that the judge had rejected the asylum claim on the basis of the appellant's behaviour within the meaning of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The judge had not considered whether his claim had in fact been fabricated by his solicitor without his involvement. He had not properly referred to the appellant's asylum claim and had not looked at the evidence in the round. Reference was made to *SM (Iran)* [2005] UKAIT 00116. Even when section 8 applied a judge should look at the evidence as a whole. The judge's findings had been untenable and insufficient. The judge had erred in his consideration of article 8 given that the appellant was to be returned to Afghanistan and would not live with his family in Pakistan. The judge had failed to consider humanitarian protection. If his family were to join him there might be accommodation issues in Kabul.

6. Mr Deller was unable to support the determination. He pointed out that the Secretary of State had accepted the claim as a fresh claim and had not rejected it as manifestly unfounded. While the appellant might face an uphill struggle the unreserved wholesale rejection of the claim on the basis of the previous history could not be sustained. The reasons challenge was difficult to resist in relation to asylum or humanitarian protection. The findings in relation to article 8 were lacking.
7. A point had been taken in relation to the legacy programme but this might be difficult to sustain in the light of AZ (Asylum-‘legacy’ cases) Afghanistan [2013] UKUT 00270 (IAC).
8. Mr Deller submitted that justice had completely misfired as he put it and that there had been no effective hearing and that in the circumstances the matter should be remitted to be heard afresh. Counsel was in agreement.
9. Mr Deller acknowledged that the First-tier Judge had been in some difficulty because of the gaps in the documentary evidence about the appellant’s history of applications to the Home Office. This was in part due to the papers being held in two files as the appellant had presented in more than one identity. He undertook to see if this difficulty could be addressed prior to the resumed hearing.
10. By agreement this appeal is allowed and remitted for a fresh hearing as it was accepted that the First-tier Judge had not dealt with the appellant’s claim on its merits but had focussed on the appellant’s immigration history and rejected the case based on that history. The determination is materially flawed in law. None of the findings can be preserved. In these circumstances remittal is the appropriate course.
11. I re-make the decision.
12. Appeal allowed, to be heard afresh by a different First-tier Judge. None of the findings are to stand.

Signed

20 June 2013

Judge of the Upper Tribunal