Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00044/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 December 2015	**On 13 January 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUSA NESHAT

Respondent

Representation
For the appellant: Mr S Staunton, Home Office Presenting Officer
For the respondent: Mr S Solomon of Counsel instructed by MKM Solicitors

DECISION AND DIRECTIONS

1. The respondent (hereafter "the claimant") is a national of Afghanistan. On 24 April 2008 he had been granted refugee status in the UK with Leave to Remain to April 2013. On 24 April 2014) the claimant was convicted of sexual assault on a female and sentenced in June the same year to 2 years' imprisonment. On 8 July 2014 a deportation order was made against the claimant as a foreign criminal and on 14 July a letter detailing reasons was sent confirming that: (i) on 12 August 2014 he had been informed of the intention of the appellant (hereafter "the

Secretary of State or SSHD") to exclude him from international protection on s. 72 grounds under s.72(6) of the Nationality, Immigration and Asylum Act 2002 and he was invited to rebut the presumption that the crime for which he was convicted was particularly serious and that his continued presence in the UK would constitute a danger to the community. It was noted that he did not respond to this letter; (ii) on 22 December the SSHD notified him of her intention to cease his refugee status and UNHCR was informed; (iii) on 29 April 2014, having considered the claimant's and UNHCR's response, the SSHD decided that the claimant's refugee status had ceased. The essential reason for the cessation was that the SSHD had considered whether the claimant was still at risk of ill treatment at the hands of Mohammed Qasim Fahim on account of his membership of the well known Nishat family but had concluded this was no longer the case. On pages 5-6 of the decision letter it was noted that the COI Service had made enquiries with the British Embassy in Kabul in May 2010 following another COI request abut the Nishat family, "but the Embassy did not recognise the Nishat family name. The COI Service also checked the Afghan Bios website which currently lists approximately 2500 high profile characters in Afghan society. … The Nishat family name did not appear on this database".

2. The claimant's appeal came before First tier Tribunal Judge Andrew who on 2 November 2015 allowed his appeal. At [14]-[19] the judge set out the applicable law on cessation and said at [18] that in order to qualify for international protection the claimant had to meet the requirement of the Protection Regulations (Cm 6918) and the Immigration Rules implementing the Qualification Directive. At [19] she added:

> "Further, it was accepted at the commencement of the hearing by the [SSHD's] representative that if I were to find that the [claimant's] refugee status should not be ceased then that would be the end of the matter as if the4 [claimant] was a refugee then he could not be deported from the UK. "

3. At [25] the judge noted that she had before her a number of unreported determinations which refer to the claimant's family members – "he refers to them as cousins but for the most part I am satisfied that this is a loose use of the word cousin". In these determinations the individuals concerned had been found to be at risk of persecution by virtue of being members of the Nishat family and connected with the Communist Party.

4. At [36] the judge noted the COIS evidence relied on by the SSHD dated 11 July 2012. The judge noted that this evidence:

> "... suggests that the Nishat family is not known in Afghanistan as having been involved with Communism or the family being persecuted. This report has taken no note of any of the evidence of Dr Giustozzi referred to in several of the Determinations that I have before me. I bear in mind that Dr Giustozzi is a recognised expert in the situation in Afghanistan and for this reason I prefer his evidence to that contained in the COIS report".

5. At [39] she concluded that she was:

> "... unable to be satisfied that the [SSHD] has shown that there is a change of circumstances in Afghanistan of a significant and non-temporary nature and the circumstances which justified the [claimant's] fear of persecution on the basis of which refugee status was granted no longer exists. Indeed the Respondent has adduced no evidence to show that members of the Neshat family are no longer at risk in Afghanistan".

6. At [40] the judge added that as she had allowed the appeal on this ground "and in view of the fact that the Appellant is a refugee I have not gone on to consider any appeal against deportation as the[claimant] comes within one of the automatic exceptions".

7. The SSHD's grounds of appeal submitted that the judge had erred in law in (i) failing to make any findings on the s.72 certificate or to give any consideration to human rights grounds; (ii) failing to make any findings as to whether the claimant was related to the persons named in a number of unreported determinations said to concern the claimant's cousins; and in (iii) failing to give adequate reasons for attaching significant weight to the evidence of Dr Giustozzi contained within the unreported determinations.

8. I am grateful to the parties for their submissions.

9. Notwithstanding that I find no merit in ground (ii), I am in no doubt that the First tier Tribunal judge materially erred in law.

10. As regards ground (i), it is clear as a matter of law that when dealing with a case in which the SSHD has issued a s.72 certificate a judge is bound by s.72(10)(a) to "… begin substantive deliberation of the appeal by considering this certificate," By s.72(10(b) he or she must, "if in agreement that presumptions under subsections (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) … dismiss the appeal in so far as it relies on the ground specified in subsection 9(a)."

11. It is manifest that the judge failed to perform the statutory duty imposed on her by s.72(10). Mr Solomon submits that this failure was not material because the Presenting Office had conceded that the certificate did not apply. Not only is there nothing in the decision letters and correspondence from the SSHD saying that, but there is nothing recorded in the determination to show that; nor (Mr Solomon concedes) is there any mention even in the note held by him (or anyone else) of the hearing that records such a concession. Insofar as Mr Solomon sought to submit that the judge's determination indicates that it was nevertheless "implicit" that the SSHD no longer relied on the certificate, I find nothing to demonstrate that this was the case. In the absence of any clear indication by the SSHD expressed at the hearing that the certificate was no longer relied on, it would be wholly wrong to try and infer that such an indication was given.

12. Mr Solomon submits that even if I were to decide (as I have) that the judge erred in law in failing to first consider the certificate, this did not amount to a material error because the reasons she gave for allowing the appeal on the basis that the claimant had not ceased to be a refugee were unimpeachable.

13. I am not persuaded by this submission. Leaving aside the plain error in [39] where it is stated that "the [SHD] has adduced no evidence to show that members of the Nishat family are no longer at risk in Afghanistan" , the judge's reasons set out at [36] for rejecting the COIS evidence to this effect relied on by the SSHD disclose a flawed reliance on excerpts of a report by Dr Giustozzi which had been before tribunal judges dealing with the cases of individuals who had been found to be at real risk of persecution on account of membership of the Nishat family. As Mr Solomon acknowledged, Judge Andrew did not have Dr Giustozzi's full report before her; she relied solely on the excerpts cited in the unreported determinations. She was therefore unable to say whether or not that report addressed the COIS evidence or, if it did not, why Dr Giustozzi's report should be "preferred". A judge is not entitled to attach weight to an expert report unless satisfied that it has addressed evidence for and against the conclusions it reaches as to risk on return.

14. Given that Judge Andrew made no findings on whether the claimant (even if subject to cessation) was entitled to succeed on Article 3 or Article 8 ECHR grounds, Mr Solomon cannot pray in aid a set of alternative findings that were capable of standing alone irrespective of flaws in treatment of the certificate and/or the cessation issue.

15. I noted earlier that I considered that the judge had materially erred in law notwithstanding the lack of merit in ground (ii). My reason for finding no merit in this ground is that it is sufficiently clear that the judge found as a fact that the individuals involved in the unreported determinations identified were members of the same extended family and the respondent's grounds do not in terms challenge any of the judge's findings of fact on this issue.

16. For the above reasons I conclude that the judge materially erred in law and that her decision must be set aside.

17. I sought submissions from the parties as to what course I should adopt were I to conclude that the judge had materially erred in law. Mr Solomon submitted that I should remit the case to the First-tier Tribunal. He also submitted that I should preserve the judge's findings of fact. I am persuaded that this would be a suitable case to remit, but not that there is any basis for preserving any of the judge's findings of fact. Those findings were predicated on the judge's positive assessment of the quality and reliability of the report by Dr Giustozzi and such assessment has been found to be flawed.

Directions

18. **I would direct, however, that:**

as soon as practicable the First tier Tribunal hold a Case Management Review hearing;

(a) in time for this hearing the SSHD is to produce the aforementioned report of Dr Giustozzi (which should be available from the files relating to the unreported determinations identified by Judge Andrew);

(b) in time for the hearing the SSHD clarifies whether she disputes that the claimant is a member of the Nishat family; and

(c) in time for the hearing, the SSHD clarifies whether she no longer accepts that members of the Nishat family face a real risk of persecution in Afghanistan.

Both parties are at liberty to adduce further evidence in accordance with further tribunal directions.

It will be necessary for the First tier Tribunal to consider first the issue of the certificate. In that connection, it is a relevant consideration that the claimant did not respond when first informed that a certificate was under consideration; however, under the terms of s. 72(10)(b), the claimant must be afforded the opportunity of rebuttal.

(a) For the above reasons:

(b) The First tier Tribunal materially erred in law and its decision is set aside.

(c) The case is remitted to be heard by a First tier Tribunal, excluding Judge Andrew.

Signed
Judge of the Upper Tribunal

Date: