



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-005987**  
**First-tier Tribunal No:**  
**PA/50703/2022 (IA/01753/2021)**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 06 August 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MR M A K**  
**(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Jagedesham, Counsel

For the Respondent: Mr Tan, Senior Home Office Presenting Officer

**Heard at Manchester Civil Justice Centre on 1 August 2023**

**DECISION AND REASONS**

1. The Appellant is a national of Pakistan, date of birth 19 August 2005, who on 7 January 2020 applied for asylum.
2. The Respondent refused his application in a decision dated 28 January 2021 because the Respondent was not satisfied (a) the Taliban tried to recruit either the Appellant or his brother or killed his mother or (b) he was a lone child returning to Pakistan with no relatives in the United Kingdom.
3. The case was listed before Judge of the First-tier Tribunal Dilkes (hereinafter referred to as the FTTJ) on 28 March 2022 who subsequently

dismissed the Appellant's appeal under the Refugee Convention, the Qualification Directive or on human rights grounds.

4. The Appellant sought permission to appeal on 20 April 2022 arguing the FTTJ had erred. Permission to appeal was granted by Judge of the First-tier Tribunal Loke on 13 June 2022 who found:

"It is arguable that the Judge misapplied the burden of proof. At paragraphs [26], [45], [60] and [62] the Judge appears to consider whether the Respondent's case was reasonably likely rather than whether the Appellant's case was reasonably likely."

5. Mr Jagedesham adopted the grounds of appeal and the grant of permission and invited the Tribunal to find there had been an error in law. Mr Jageesham highlighted a number of grounds of appeal the main ground related to whether the FTTJ had erred in her application of the standard of proof. Mr Jagedesham submitted the FTTJ applied the wrong burden of proof in paragraphs [26], [45], [60] and [62] of the determination. The FTTJ made adverse findings against the Appellant but applied the reasonably likely test which amounted to an error in law. If the FTTJ intended to make negative findings, Mr Jagedesham submitted she should have used words similar to "there is no real doubt that something happened" or "I do not accept the Appellant's claim". The "reasonably likely" test is relevant to where the FTTJ makes a positive finding as against a negative finding. Reliance for this argument was placed on the recent decision of MAH (Egypt) v SSHD [2023] EWCA Civ 216.
6. No Rule 24 response was filed but Mr Tan opposed the appeal. With regard to this specific ground Mr Tan submitted the FTTJ set out the correct burden and standard of proof in her decision and that her findings should be read altogether rather than individually. This ground ignored the fact the FTTJ's findings were based on inconsistencies between the current evidence and that of previous brother's previous appeal and a VAF application. The findings highlighted at paragraphs [26], [45], [60] and [62] should be read as part of the whole decision Mr Tan conceded the FTTJ could have phrased the wording better but invited the Tribunal to look at the overall decision.
7. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (512008 /269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

## **DISCUSSION AND FINDINGS**

8. There were a number of issues raised in the grounds of appeal and in giving permission to appeal Judge of the First-tier Tribunal Loke primarily concentrated on the issue as to whether the FTTJ had misapplied the standard of proof but granted permission on all grounds. Having

considered the submissions on this ground I am satisfied there was an error in law for the reasons hereinafter set out and consequently I have not addressed the remainder of the grounds of appeal.

9. The Respondent was unrepresented in the First-tier Tribunal but the FTTJ summarised the Respondent's position at paragraph [7] of her decision where she recorded the Respondent did not accept the Appellant was a lone child or that the Taliban:
  - a. Tried to recruit the Appellant's brother.
  - b. Killed the Appellant's mother.
  - c. Tried to recruit the Appellant himself.
10. Having heard evidence from the Appellant the FTTJ made a number of findings about the Appellant's account compared to previous proceedings involving the Appellant's family. The FTTJ was aware of the correct burden and standard of proof as she referred to both at paragraph [13] of her decision stating "the burden of proof lies on the Appellant to substantiate (his) asylum claim ..... The applicable standard of proof is a "reasonable degree of likelihood".
11. After hearing Mr Tan's submissions, I raised with him the fact the FTTJ appeared to be making findings applying the standard of proof incorrectly. Mr Tan argued that the decision should be looked at as a whole although he conceded the words used by the FTTJ could have been phrased better. The permission to appeal referred to four specific examples where the Judge felt there may have been an error of law:
  - a. Paragraph [60] of her decision the FTTJ wrote "... I find it is reasonably likely that the appellant has not given his correct address in Pakistan." As Mr Jagedesham correctly argued the FTTJ must apply the reasonably likely test if accepting something the Appellant has said but when dealing with a finding that did not happen the FTTJ must say she did not accept that matter otherwise the benefit of the doubt should go to the Appellant given the low standard of proof.
  - b. Paragraph [26] after making a number of findings in the preceding paragraphs the FTTJ pulls the findings together and used the same tests as she did in paragraph [60] thereby applying the standard of proof in correctly. If she did not believe the Appellant's account about his brother then she needed to specifically state that rather than refer to it not being "reasonably likely".
  - c. In the paragraphs preceding paragraph [45] the FTTJ appeared to reject the Appellant's explanation about the Appellant's father coming for medical reasons and in paragraph [45] wrote, "For this letter to have been sent to the appellant's father, I find it reasonably likely that the intended recipient of the kidney had been discussed and that is reasonably likely that this was a family member in the UK, and I find it is reasonably likely that the

appellant's father had a family member in the UK." These findings were contrary to what the Appellant had been saying in evidence and again the standard of proof was wrongly applied and if she did not believe the Appellant's account then she needed to specifically state that and not make the finding in the way she did in that paragraph.

- d. The preceding paragraphs to paragraph [62] discussed contact with family and what family the Appellant had in Pakistan. At paragraph [62] the FTTJ wrote, "However, I consider that the documentary evidence undermines the appellant's evidence of what he says he witnessed in terms of his brother's disappearance and regarding the address the appellant has given in Pakistan and when considering the evidence in the round and to the lower standard I consider that it is reasonably likely that the appellant has not given his correct address in Pakistan which is not due to his age but is contrived and I therefore reject the appellant's account of the problems with the Taliban, and I reject that he is a lone child returning to Pakistan. I find it is reasonably likely that the appellant will be able to contact his family and that he will not be a lone child returning to Pakistan." Again, the mistake being if a fact is rejected then the FTTJ should not be applying the "reasonably likely" test as was done in this and the previous examples.
12. Whilst all her findings may have been open to the FTTJ unfortunately, because the standard of proof has been wrongly applied when those findings were made, as distinct from the beginning of the determination where it is set out correctly, I cannot be certain that in making those findings the FTTJ has correctly applied the standard of proof and it therefore follows that the findings are flawed. For the sake of clarity, where a Judge rejects a particular claim that claim should be expressly rejected whereas if a Judge accepts a claim advanced then the claim need only be accepted to the lower standard of proof assuming this case falls under the pre July 2022 change in the law.
  13. Mr Tan and Mr Jagedesham agreed that if there was an error the decision would have to be remade and that no findings could be preserved.
  14. Paragraph 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:
    - a. the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
    - b. the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

15. In my judgment, given that it is necessary for all the issues in this case to be considered afresh on the merits, this case falls within para 7.2 (a) and (b) because further evidence, including oral evidence is likely, and findings of fact on the issues will need to be made.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety.

This case is remitted to the First-tier Tribunal for a fresh hearing on all issues on the merits by a Judge other than Judge of the First-tier Tribunal Dilkes.

Deputy Judge of the Upper Tribunal Alis  
Immigration and Asylum Chamber

**2 August 2023**