EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Macfadyen
Lord Nimmo Smith
Lord Kingarth

[2007] CSIH 65
XA98/05

OPINION OF THE COURT

delivered by LORD MACFADYEN

in

APPEAL

under

section 103B of the Nationality, Immigration and Asylum Act 2002

by

H A

Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Devlin; Drummond Miller, W.S. (for Appellant)
Alt: A. F. Stewart; Office of the Solicitor to the Advocate General (for Respondent)

2 August 2007

Introduction

[1] The appellant is a twenty year old citizen of Afghanistan who entered the United Kingdom clandestinely on 1 December 2003. He claimed asylum on 13 December 2003. By decision letter dated 13 February 2004 the respondent refused

the appellant's asylum claim. The same letter also expressed the respondent's decision that the United Kingdom would not be in breach of its obligations under the European Convention on Human Rights if the appellant were returned to Afghanistan. The appellant appealed against those decisions to an Adjudicator. On 25 May 2004 the Adjudicator dismissed that appeal. The appellant sought and, on 8 October 2004 was granted, permission to appeal against the Adjudicator's decision. In June 2005 that appeal, which in terms of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 proceeded by way of reconsideration, was refused by an Immigration Judge. The appellant then sought permission from the Asylum and Immigration Tribunal to appeal to this court. On 4 August 2005 permission to appeal was refused by the Tribunal. Application for leave to appeal was then made to this court and on 7 March 2006 such leave was granted. This court therefore has before it the appellant's appeal against the Immigration Judge's decision of June 2005.

The circumstances

[2] The narrative of circumstances on which the appellant bases his claims may be summarised as follows. The appellant was born in Mazar-i-Sharif in Afghanistan. He has two sisters who now live with their husbands in Afghanistan and Pakistan respectively. His mother is deceased. His father and one brother were killed by the Taliban. Another brother disappeared and is believed to have been taken by the Taliban. A third brother, MA, fled Afghanistan and now resides in the United Kingdom.

[3] In about December 2002 the appellant met a girl called M, and they began a relationship. They did so secretly, so that no-one would know that they were going out together. They would go to different places including the park. On about six

occasions they were able to meet at the appellant's sister's house as there was no one at home. On those occasions they had sexual relations. In about June 2003 M discovered that she had become pregnant and told her mother that the appellant was the father.

[4] The appellant knew that it would not be acceptable to M's family that he should marry her, as her father, Commander A, was important in the region. Commander A is a commander in General Doustom's army, and is thus a senior military figure in Mazar-i-Sharif. He has a lot of power there and in the north of Afghanistan. He is an Uzbek. In addition, the appellant's own family was considered to be of a lower caste.

[5] M's ten year old sister told the appellant that her family knew that he was the father of M's expected child. He therefore left home and went to an aunt's house about an hour's drive away. His sister came to see him and asked him what had happened, because her husband had been arrested and beaten. The appellant therefore went to hide with a friend. He was told by his brother-in-law that he would be killed if he returned. He was told by his brother-in-law that he should leave Afghanistan. As members of the Northern Alliance, Commander A and his sons had a lot of power and influence with the Transitional Administration throughout the country, and would find him wherever he went. The appellant telephoned his brother in the United Kingdom, who said that he should sell the family home and use the proceeds to leave Afghanistan. The appellant therefore did so.

[6] After the appellant left Afghanistan, members of the authorities under Commander A's control went to the appellant's brother-in-law's shop and demanded to know where the appellant was. When his brother-in-law said that the appellant's whereabouts were not known, he was so badly beaten that he required hospital

treatment. He was forced to close his shop. It has not re-opened. He and his wife went first to Kabul, then to Peshawar in Pakistan because they were not safe in Kabul. Commander A found them in Kabul, again arrested the brother-in-law and demanded that he tell them where the appellant was. When it was found that the appellant was not in Afghanistan his brother-in-law was released.

[7] On 27 March 2004 the appellant received from Afghanistan a copy of an arrest warrant that had been issued for him. His friend J, with whom he had been hiding in Afghanistan, obtained it for him. J had a relative who worked in the police station in Mazar-i-Sharif, had seen a file containing the document, and had obtained a copy of it.

[8] The appellant fears that if he is captured he will be killed at once. The punishment for what he has done is death by stoning. No one has heard of M since the appellant left Afghanistan. He does not know if she is still alive.

The submissions for the appellant

[9] In opening his submissions for the appellant, Mr Devlin formulated five propositions in which he identified what he said were errors in law on the part of the Immigration Judge. The first proposition was that the Immigration Judge erred in law in that there was insufficient evidence before him to entitle him to exclude the appellant's account of his activities with M as incredible. There followed three more propositions asserting error on the part of the Immigration Judge in reaching other conclusions on matters of credibility. Although those were initially articulated as separate propositions, they came in the course of the development of Mr Devlin's submissions to assume the role of subsidiary elements of the first proposition. Finally,

Mr Devlin advanced the proposition that the Immigration Judge erred in law in finding that the appellant could safely relocate in Kabul or elsewhere.

The proper approach to identifying error of law

[10] At the outset of the development of his main submission, Mr Devlin accepted that the appeal to this court is an appeal on point of law only. He accepted that this court could not simply examine the evidence with a view to forming its own view as to the facts established. He said that it was not his submission that this court was entitled to enter into the assessment of the evidence on the merits of the claim. However, he submitted, that did not mean that the court was prevented from examining a decision for error of law merely because the decision involved findings of fact or inferences drawn from findings in fact. A finding in fact might disclose an error of law if there was insufficient evidence to support it. In asylum cases, the assessment of whether there was sufficient evidence to support a finding in fact called for the most anxious scrutiny. Such an assessment should be based on a holistic view of all the relevant evidence.

[11] The soundness of Mr Devlin's initial concession is amply borne out by observations made in *Mehmet Kahye* v *Secretary of State for the Home Department* [2003] EWCA Civ 317, which was cited to us by Mr Stewart for the respondent. In that case Scott Baker LJ said:

> "10. ... [I]t is clear to me that the way in which the renewed application is advanced is nothing more than a disagreement with the tribunal's findings of fact. That does not found a basis for an appeal to this court, which has to be on the ground that the tribunal erred in law. ...

> 12. ... In my judgment, it is high time that [those] involved in these cases ... appreciate ... that it is wholly inappropriate to try to dress up an appeal as a point of law which is really a disagreement with the fact-finding conclusions of the tribunal."

The point was reinforced in the judgment of Lord Woolf of Barnes CJ at paragraphs 14 to 17. We are not to be taken as suggesting that in the present case the submissions made by Mr Devlin involved any abuse of the procedures of the court, but it is salutary to be conscious of the risk of allowing the limitation of the right of appeal to points of law to be circumvented or eroded by characterising in one way or another as points of law matters that are truly mere disagreement with the fact-finder on matters of fact.

[12] Although at first Mr Devlin appeared to be arguing that any conclusion on a matter of fact required to be founded on sufficient evidence, whether that conclusion was a positive finding in fact or a refusal to accept evidence as credible or plausible, as his submission developed it came to be that where evidence was rejected as incredible or implausible, there had to be grounds for so rejecting it which would bear scrutiny. The reason for rejection might lie in the acceptance of other evidence, but did not inevitably do so. It must not rest on mere conjecture or speculation. Evidence might, however, be rejected as incredible or implausible if it lay so far beyond human experience as to be inherently unlikely.

[13] It is as well to bear in mind, in approaching the question of whether a decision on credibility involves any error of law, that, as the Immigration Judge reminded himself at paragraph 23 of his determination, the standard of proof incumbent on the appellant is the low standard of reasonable likelihood (*Sivakumaran* [1988] Imm AR 147; *Kaja* [1995] Imm AR 1; *Karanakaran* [2000] Imm AR 271). It is also right for

us to bear in mind, as Mr Devlin submitted we should, that cases of this nature, which involve fundamental human rights, "call for the most anxious scrutiny" (*Bugdaycay* [1987] 1 AC 514 per Lord Bridge of Harwich at 531G; see also *Regina* v *Ministry of Defence, Ex parte Smith* [1996] QB 517 per Simon Brown LJ at 537-8).

[14] In support of his submission that decisions on matters of credibility or plausibility require to be adequately explained, Mr Devlin cited two cases. The first of these was *HK* v *Secretary of State for the Home Department* [2006] EWCA Civ 1037. In that case the leading judgment was given by Neuberger LJ, who observed (at paragraph 24) that the court could normally be expected to refuse to interfere with findings of primary fact and the drawing of inferences from such conclusions. At paragraph 25 his Lordship continued:

> "However, ... this does not mean that we cannot quash the decision of the Tribunal in this case merely because it involved findings of fact and the drawing of inferences from those findings. Thus, in *E* v *Secretary of State* [2004] QB 1044 Carnwath LJ ... said at paragraph 66 that 'a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law', albeit subject to certain conditions which he then enumerated."

Although Mr Devlin cited that passage, he did not develop any submission based on the *dictum* of Carnwath LJ, and we need therefore say nothing more about it except that we reserve our opinion on the soundness or at least the scope of the proposition. Neuberger LJ went on (in paragraph 26) to recognise perverseness in connection with a finding in fact as an aspect of error of law, and quoted from *R (Iran)* v *Secretary of State* [2005] EWCA Civ 982, per Brooke LJ at paragraph 11, where the concept of perversity was recognised as including "irrationality or unreasonableness in the *Wednesbury* sense" as well as "a finding in fact that was wholly unsupported by

evidence". In paragraph 27, his Lordship discussed the particularly acute difficulty of the fact-finding exercise in asylum cases (*Gheisari* v *Secretary of State* [2004] EWCA Civ 1854). His Lordship continued:

> "28. Further, in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. Ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).
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> 29. Inherent improbability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. ...
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> 30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in *Awala* v S*ecretary of State* [2005] CSOH 73 [reported *sub nom. Wani* v *Secretary of State for the Home Department* 2005 SLT 875]. At paragraph 22 he pointed out that it was 'not proper to reject an applicant's account *merely* on the basis that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion' (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done 'on reasonably drawn inferences and not simply on

conjecture or speculation'. He went on to emphasise, as did Pill LJ in *Ghaisari* [*sic*], the entitlement of the fact-finder to rely 'on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible'. However, he accepted that 'there will be cases where actions which may appear implausible if judged by ... Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background."

[15] The second case relied on by Mr Devlin was *Reid* v *Secretary of State for Scotland* 1999 SC (HL) 17, [1999] 2 AC 512. He quoted the following passage from the speech of Lord Clyde at 41H-42B (541F-542A):

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have misused or abused the authority which it had. It may have departed from the procedures which either by statute or at common law as matters of fairness ought to have been observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or sufficient evidence, to support it or through account being taken of irrelevant matter, or through failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly

clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

We have no difficulty in accepting that those observations, made in the context of judicial review, are applicable also in the context of a statutory appeal confined to points of law. However, we note that, comprehensive as Lord Clyde's observations were, they had no need to, and therefore did not, address the particular issue of the basis on which a tribunal's approach to questions of credibility may disclose error of law.

[16] Mr Stewart reminded us of the guidance on the assessment of credibility in the immigration context offered in *Esen* v *Secretary of State for the Home Department* 2006 SC 555, per Lord Abernethy delivering the opinion of the court at paragraph 21:

"Credibility is an issue to be handled with great care and with sensitivity to cultural differences and the very difficult position in which applicants for asylum escaping from persecution often find themselves. But our system of immigration control presupposes that the credibility of an applicant's account has to be judged (*Asif* v *Secretary of State for the Home Department* [2002 SC 182]). Credibility is a question of fact which has been entrusted by Parliament to the adjudicator. The adjudicator is someone specially appointed to hear asylum appeals and has the benefit of training and experience in dealing with asylum seekers from different societies and cultures. Of course, an adjudicator must give his reasons for his assessment. A bare assertion that an applicant's account is implausible is not enough (*W321/01A* v *Minister for Immigration and Multicultural Affairs* [2002 FCA 210]). But an adjudicator is entitled to draw an inference of implausibility if it is based on the evidence he has heard and in coming to his conclusion he is entitled to draw on his common sense and his

ability, as a practical and informed person, to identify what is or is not plausible (*Wani* v *Secretary of State for the Home Department*)."

What is there said about an adjudicator is, we accept, applicable to an immigration judge.

[17] In the light of the cases cited to us it is convenient at this stage to formulate some propositions about the circumstances in which an immigration judge's decision on a matter of credibility or plausibility may be held to disclose an error of law. The credibility of an asylum-seeker's account is primarily a question of fact, and the determination of that question of fact has been entrusted by Parliament to the immigration judge (*Esen*, paragraph 21). This court may not interfere with the immigration judge's decision on a matter of credibility simply because on the evidence it would, if it had been the fact-finder, have come to a different conclusion (*Reid*, per Lord Clyde at 41H). But if the immigration judge's decision on credibility discloses an error of law falling within the range identified by Lord Clyde in the passage quoted above from *Reid*, that error is open to correction by this court. If a decision on credibility is one which depends for its validity on the acceptance of other contradictory facts or inference from such facts, it will be erroneous in point of law if the contradictory position is not supported by any, or sufficient, evidence, or is based on conjecture or speculation (*Wani*, paragraph 24, quoted with approval in *HK* at paragraph 30). A bare assertion of incredibility or implausibility may disclose error of law; an immigration judge must give reasons for his decisions on credibility and plausibility (*Esen*, paragraph 21). In reaching conclusions on credibility and plausibility an immigration judge may draw on his common sense and his ability, as a practical and informed person, to identify what is, and what is not, plausible (*Wani*, paragraph 24, page 883L, quoted with approval in *HK* at paragraph 30 and in *Esen* at

paragraph 21). Credibility, however, is an issue to be handled with great care and sensitivity to cultural differences (*Esen*, paragraph 21), and reliance on inherent improbability may be dangerous or inappropriate where the conduct in question has taken place in a society whose culture and customs are very different from those in the United Kingdom (*HK* at paragraph 29). There will be cases where actions which may appear implausible if judged by domestic standards may not merit rejection on that ground when considered within the context of the asylum-seeker's social and cultural background (*Wani*, paragraph 24, page 883I, quoted with approval in *HK* at paragraph 30). An immigration judge's decision on credibility or implausibility may, we conclude, disclose an error of law if, on examination of the reasons given for his decision, it appears either that he has failed to take into account the relevant consideration that the probability of the asylum-seeker's narrative may be affected by its cultural context, or has failed to explain the part played in his decision by consideration of that context, or has based his conclusion on speculation or conjecture.

The Immigration Judge's decision - the objective evidence

[18] In paragraphs 61 to 64 of his determination the Immigration Judge narrates the objective evidence which he took into account in approaching the credibility of the appellant's narrative of his relationship with M. His source was the Afghanistan Country Report dated April 2005 prepared by the Country Information and Policy Unit of the Immigration and Nationality Directorate of the Home Office ("the CIPU Report"). He summarised paragraphs 6.167, 6.168, 6.169 (misprinted as 6.619), 6.177, 6.209, 6.224 and 6.242 of the CIPU Report. He pointed out in paragraph 65 of his determination that there was nothing to contradict that material, and went on:

"There is no objective evidence, of any kind, to suggest to me that the account given by the Appellant in relation to his activities with [M] is remotely likely. ...

66. There is nothing to suggest in any of the objective evidence before me that the Appellant and [M] would have been able to enjoy the relatively open relationship that they did have [*sic*; presumably he meant "that the appellant claimed that they had"] by meeting every day and going to the local park. Were the case that this happened I would have expected this type of activity to have been revealed in the objective evidence before me notwithstanding what is stated in the objective evidence that it is difficult to obtain reliable data. There is no such evidence.

67. The extent of the continuing restrictions faced by women in Afghanistan suggests to me that there is no reasonable degree of likelihood that the Appellant's account is true."

[19] Mr Devlin submitted that there was no sufficient basis in the CIPU Report for the conclusion which the Immigration Judge reached in paragraph 67 of his determination. The restrictions on women referred to in the passages relied on were for the most part of a different nature. In paragraph 6.168 there was reference to girls "once confined to their homes", which implied that that was no longer so. The statement that improvements in women's and girls' rights "can especially be seen in urban centres such as Kabul" could be applied to Mazar-i-Sharif, which was urban. The statement that "many Afghan women and girls continue to struggle to exercise fundamental rights to ... freedom of movement" implied that others did not. Paragraph 6.169 contained reference to restrictions on movement that impeded women's ability to travel, study and work, applied in "some" areas, which suggested that they did not in others. Nothing in the passages relied upon directly supported the proposition that

there was no scope for women or girls such as M to meet a man in the way the appellant said M met him.

[20] In response to this part of Mr Devlin's submissions Mr Stewart submitted that paragraphs 61 to 67 of the Immigration Judge's determination had to be read as a whole. The review of the objective evidence disclosed two themes which were relevant to the Immigration Judge's conclusion in paragraph 67. The first was that there remained widespread restrictions on movement for women and girls. The second (paragraph 6.224) was that marriage remained a question of relationships between families, not individuals. The Immigration Judge had properly gone about the task of evaluating what support, if any, the appellant's account derived from the objective evidence (*Esen*, paragraph 21; we would add *HK* at paragraph 28). No error of law was disclosed in that part of his determination.

[21] In our opinion Mr Stewart's analysis of this aspect of the Immigration Judge's determination is well-founded. The Immigration Judge was undoubtedly entitled, indeed bound, to examine the objective evidence to see whether it afforded on the one hand support for, or on the other hand ground for rejecting as incredible, the appellant's account of his relationship with M. It is right that, as Mr Devlin pointed out, there was nothing in the objective evidence that bore directly and expressly on the likelihood of a girl like M being able to go out and meet with a young man like the appellant in the circumstances to which the appellant spoke in his evidence. Indeed in paragraph 66 the Immigration Judge made just that point. However, the general tenor of the objective evidence is of continuing restrictions on the freedom of women and girls. When that is taken with the evidence about the attitude to marriage, it seems to us that the Immigration Judge was entitled, as a matter of legitimate inference, to conclude that circumstances in Mazar-i-Sharif, and in M's family, were not such as to

lend any support to the credibility of the appellant's account, and indeed pointed the other way. We conclude that in this part of his determination the Immigration Judge was properly carrying out his function as primary fact-finder, and that his approach discloses no error of law.

The Immigration Judge's decision - reasons for rejection of the appellant's account.

[22] In paragraph 68 of his determination the Immigration Judge gives three reasons, derived from the appellant's own evidence, for finding the appellant's account of his relationship with M incredible. Mr Devlin attacked each of these as disclosing an error of law.

[23] The first reason given in paragraph 68 is in the following terms:

> "What seems particularly unlikely is that the Appellant would telephone [M's] house knowing that while her parents might not be there her brothers could, presumably, have answered the telephone call. From his own evidence the Appellant knew that his relationship with [M] was not one that would be approved of. [M] would then walk (whether she was wearing a burqa or not we do not know) to the Appellant's sister's house where they would engage in a sexual relationship."

[24] The oral evidence of the appellant on which that reason is based is recorded in paragraph 28 of the determination in the following terms:

> "He would call [M] at her house and either [M] or her younger sister would answer. He would ring at about 12.15 from his sister's house and [M] would walk about one kilometre to his sister's house."

Mr Devlin submitted that, since that was all that was recorded by way of evidence, the comment by the Immigration Judge that M's brothers could have answered the telephone was conjecture or speculation, as was made clear by the use of the word "presumably". The evidence recorded that the calls were made at an arranged time, and that M or her sister would answer. There was apparently no evidence about where M's brothers might be at the arranged time. Without more detail in the evidence there was no sufficient basis for a finding that that aspect of the appellant's account was so improbable as to cast doubt on its plausibility. The appellant's account could not be excluded on a bare assertion that it was implausible (*W321/01A* v *Minister for Immigration and Cultural Affairs*, per Lee J at paragraph 30, quoted with approval in *Esen* at paragraph 21). That part of the Immigration Judge's reasons for rejecting the credibility of the appellant's account thus did not bear scrutiny, and revealed an error of law.

[25] The second reason given in paragraph 68 is in the following terms:

> "Given that the Appellant knew that his relationship, if discovered, would lead to serious problems it is surprising that there is no evidence before me of the precautions taken by the Appellant and [M] to ensure that she did not become pregnant. It might be thought that this is one area where considerable caution would have been exercised by the Appellant but there was no evidence on this aspect."

[26] Mr Devlin submitted that the Immigration Judge had acted unfairly in not raising with the appellant his concern about the absence of evidence of precautions against pregnancy. He cited *Hadmor Productions Ltd* v *Hamilton* [1983] AC 191 per Lord Diplock at 233B-D where reference was made to:

"the right of each [party] to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is."

Mr Devlin also cited (from Symes and Jorro, *Asylum Law and Practice*, paragraph 2.31) an observation made by Lord Bingham writing extra-judicially in 1983:

"No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

Mr Devlin invited us to adopt that and to apply it to the Immigration Judge's view of what "might be thought" on the question of precautions against pregnancy.

[27] The third reason given in paragraph 68 is in the following terms:

"The Appellant indicates that he was very fond of [M] and presumably her [*sic*] feelings were reciprocated and yet it appears that she did not tell him that she was pregnant. ... While it is well known that a daughter will often confide in her mother at such times it seems to me that both [M] and the Appellant knew very well that this was a relationship that would be very much disapproved of by [M's] mother and particularly her father. It might be thought that [M] would then be more likely to tell the Appellant of her pregnancy and seek his advice on what she should do knowing that when she told her mother sanctions would be likely to be applied to her including the restriction that she would not then be able to see the Appellant. In a genuine relationship it seems to me that [M] would have been likely to have made every effort to have seen and discussed her pregnancy with the Appellant but, on the Appellant's account she did not do so."

[28] Again Mr Devlin's submission was that in that passage the Immigration Judge fell into error of law in failing to consider the effect of the different culture in which the appellant and M were living. He drew inferences about what "might be thought" and what would have been likely to take place "in a genuine relationship" without disclosing that he had given any thought to the cultural context, and whether young people in Afghanistan might have behaved differently from the way in which he thought they would.

[29] Mr Stewart submitted that throughout paragraph 68 the Immigration Judge was exercising properly his function of assessing the credibility of the appellant's evidence. He was following the guidance given in *Esen* at paragraph 21. He was, as he was entitled to do, drawing on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible. There was no error in law in the reasoning that led him to the conclusion in paragraph 69 that:

> "In both the broad outline of the Appellant's case that he and M had a relationship and in the detail of how that relationship was carried out ... there is no reasonable degree of likelihood that this account is true."

[30] We have come to the conclusion that there is force in the criticisms made by Mr Devlin of the Immigration Judge's reasoning in paragraph 68 of his determination, and that that reasoning does disclose error of law. So far as the point about the telephone calls is concerned, the Immigration Judge appears to have proceeded on the view that the appellant's evidence was inherently unlikely. That in itself is a dangerous approach, but it is compounded by the fact that the improbability arises from a view of the risk of M's brothers answering the telephone which proceeds on no more than conjecture. We therefore are of opinion that in that respect the Immigration Judge's decision is erroneous in law. So far as the point about precautions against

pregnancy is concerned, we have some difficulty in identifying precisely what the point is that the Immigration Judge is making. Be that as it may, however, there is in our opinion force in the submission that it was unfair of the Immigration Judge, if he found in the absence of evidence about precautions against pregnancy ground for regarding the evidence about the relationship as implausible, not to put that point to the appellant to give him an opportunity to put forward evidence on the point. If he had done so, the appellant might, or might not, have been able to allay his concern, but the procedure would have been fair. Moreover, there is also in our view force in Mr Devlin's submission that in coming to a conclusion on what "might be thought" of the way in which the appellant and M would have acted in the matter of precautions against pregnancy there is no indication that the Immigration Judge was alive to the fact that cultural and other circumstances in Afghanistan might be such as to make what "might be thought" to be the likely course in a domestic context very different from what would happen there. The same is even more clearly so in relation to the third point, that M told her mother about her pregnancy rather than the appellant. No account appears to have been taken of cultural considerations in reaching the conclusion that in "a genuine relationship" M would first have discussed her pregnancy with the appellant. The error in law may lie in failing to take proper account of the possibility that cultural considerations could affect the inferences that might reasonably be drawn from the evidence, or it may lie in failing to explain how such considerations were taken into account in reaching the conclusions expressed, or it may lie in proceeding on sheer conjecture as to how a young woman in Afghanistan, faced with a pregnancy by a young man whom she knew her parents would not allow her to marry, would react. We do not consider, however, that the

Immigration Judge's reasoning bears scrutiny as the foundation for a conclusion that the appellant's account of his relationship with M was inherently implausible.

The Immigration Judge's decision - the treatment of the appellant's brother-in-law.

[31] Mr Devlin's second submission, which, as we have noted, came to be developed as an aspect of his first, was that the Immigration Judge erred in law in finding that the applicant's claim that his brother-in-law had been ill-treated by Commander A on a second occasion and compelled to leave his shop was incredible. His third submission, which likewise was developed as an aspect of the first, was that the Immigration Judge erred in law in requiring corroboration that Commander A would be able to find the brother-in-law's family in Kabul and in finding that aspect of the appellant's account implausible.

[32] Both of these issues arise from the terms of paragraph 70 of the Immigration Judge's determination, the first part of which is in the following terms:

> "The Appellant says that his brother-in-law was beaten up because of the Appellant's relationship with [M]. The reason given for this is that the brother-in-law would have been able to know the whereabouts of the Appellant and he could then reveal that information to [Commander A] and [A's] sons. I accept that this is not implausible in itself but what I do find implausible is that the Appellant says this happened to his brother-in-law, again, and thereafter, it was necessary for his brother-in-law to close his shop. Given that the Appellant's brother-in-law had nothing to do with the actions of the Appellant it does strike me as unlikely that the commander would have pursued his brother-in-law to the extent that it is claimed he did."

[33] Mr Devlin submitted that in that part of paragraph 70 the Immigration Judge based his rejection of the plausibility of the appellant's evidence on mere conjecture as to how Commander A might react in the circumstances. Having accepted as plausible that Commander A would contact the appellant's brother-in-law and use violence towards him because he might thus compel him to disclose the appellant's whereabouts, the Immigration judge had no proper basis for rejecting as implausible the account that Commander A, having failed on the first occasion, made a second attempt to find out from the brother-in-law where the appellant was. The Immigration Judge offers no explanation of why, if one attempt is plausible, a second is not. Mr Stewart submitted, on the other hand, that in the passage in question the Immigration Judge was legitimately testing the account which the appellant had given. We do not agree. When account is taken of the position of power said to have been occupied by Commander A, and the attitude which he was said to have adopted to the appellant's relationship with M, some persistence in the pursuit of the appellant's brother-in-law in search of information about the appellant's whereabouts seems to us to be entirely plausible. What matters, however, is not that we would have taken a different view on this point, since that is not a matter for us, but rather than the Immigration Judge appears to have left out of account the relevant considerations to which we have referred, and to have proceeded instead on mere conjecture. In that respect we are of opinion that he erred in law.

[34] In paragraph 70 of his determination the Immigration Judge continued in the following terms"

> "What strikes me as particularly unlikely is that the Appellant's sister and brother-in-law would both flee to Kabul and that thereafter they would be found there. There is no objective information before me to indicate that it is

reasonably likely that the commander would have been able to find the Appellant's brother-in-law in Kabul. Two aspects of this strike me as particularly implausible. Firstly, that his brother-in-law would have found it necessary, because of continual targeting by the commander, to flee Kabul in the first place and, secondly, that the commander would have been interested and would have been able to track him to a particular address in Kabul and would have sought to cause him problems there. No evidence was offered as to how this happened."

In paragraph 72 the Immigration Judge turned to the evidence of the appellant's brother, MA. He suggested that it was not clear whether he had had direct contact with his sisters, and went on to say that:

"if it is the case that he is offering direct evidence that he has learned that his sister and brother-in-law have been found in Kabul and arrested then (as stated) I reject that evidence as implausible. It may be, of course, that his sister and brother-in-law do indeed now live in Peshawar in Pakistan but I do not consider there is any reasonable degree of likelihood that this is caused by the actions of Commander A."

[35] Mr Devlin submitted that in these passages the Immigration Judge was again basing his view of plausibility on conjecture. He was leaving out of account the same relevant considerations about the position of power occupied by Commander A in General Doustom's army, and consequent power and influence with the Transitional Administration throughout the country, and about his attitude to the appellant's relationship with M. So far as MA's evidence was concerned, it was clear that his evidence proceeded on direct contact with his sisters, R and Z, and that the information from R linked her and her husband's moves to Kabul and onward to

Peshawar with persecution by or on behalf of Commander A. In face of that evidence confirming the appellant's account, the Immigration Judge gave no reason for rejecting it as implausible.

[36] We accept that in those respects the Immigration Judge erred in law in reaching the conclusions he did on the implausibility of the evidence that the appellant's sister and brother-in-law fled from Mazar-i-Sharif to Kabul and onwards to Peshawar because of persecution by or on behalf of Commander A.

The Immigration Judge's decision - the arrest warrant

[37] Mr Devlin's fourth submission, also developed as an aspect of his first, related to the evidence about the issue of an arrest warrant for the appellant. The proposition initially formulated was that the Immigration Judge made an error in fact in finding in the appellant's evidence a discrepancy as to who obtained for the appellant the copy arrest warrant, but the attack on the Immigration Judge's treatment of the warrant broadened in the course of Mr Devlin's submission.

[38] The Immigration Judge dealt with the warrant in paragraph 71 of his determination. He said:

> "So far as the arrest warrant is concerned it is well known that in certain countries forged documents can readily be obtained and I attach no weight to this document. It seems fortunate in the extreme that the Appellant had sufficient contacts in Afghanistan for the document to be discovered and then obtained and faxed to him in the United Kingdom. The language of the document itself stating that the Appellant "is accused of having sex with the daughter of Commander [A]" does not create in my mind a reasonable degree of likelihood that it is authentic. Finally, I note that there is a contradiction in the

final paragraph on page 7 of his statement when he says that [J] sent the arrest warrant to him and then that it was [J's] relative who sent it to him; although I should say that, in itself, this is a minor discrepancy."

[39] The opening statement in that paragraph is general in the extreme. The second sentence is not specifically related to the account given by the appellant (and his brother) of how the copy warrant was obtained through J's relative who worked in the police station in Mazar-i-Sharif. The point about the language of the document seems to us to disclose a lack of sensitivity to the difficulties of translation. We do not know with what formality the warrant is expressed in its original language; we are not dealing with "the language of the document itself". Finally, the discrepancy noted by the Immigration Judge as to how the warrant was sent to the appellant is not a discrepancy that reveals the appellant as having changed his story over time; it occurs within a few lines of one statement. It is indeed, as the Immigration Judge commented, "in itself ...a minor discrepancy". We would not have been inclined to regard it as of any significance.

[40] Mr Stewart submitted that the *onus* of showing that a document relied upon by an appellant, such as the arrest warrant in the present case, is on the applicant (*Tanveer Ahmed* v *Secretary of State for the Home Department* [2002] Imm AR 318).

[41] On the whole, despite the comments which we have made at paragraph [29] above, we are not persuaded that the Immigration Judge's treatment of the warrant involves more than his assessment having been different from that which we might have been inclined to make if we had been the fact-finding tribunal. We do not consider that it has been shown that in this respect the Immigration Judge erred in law.

The Immigration Judge's decision - internal relocation

[42] Mr Devlin's final submission was that the Immigration Judged erred in law in finding that the appellant could safely relocate in Kabul or elsewhere in Afghanistan. The issue is discussed in paragraphs 74 to 77 of the determination. At paragraph 74 the Immigration Judge said:

> "Given the lack of Convention reason this is not, strictly, an internal flight case but an issue would arise on whether or not he would suffer Article 3 treatment in his place of relocation."

He went on to refer to two cases, namely *AM (risk - war lord - perceived Taliban) Afghanistan CG* [2004] UKIAT 0004 and *AF ("war lords/commanders" - evidence expected) Afghanistan CG* [2004] UKIAT 00284. In paragraph 76 he pointed out that there was no objective evidence that Commander A exists, or has links with General Doustom. He suggests that there is no objective evidence that General Doustom would have significant power in Kabul. In Paragraph 77 he reaches the following conclusion:

> "Accordingly, even if I had found the Appellant credible (and the arrest warrant genuine) I would have held that, on the evidence presented to me, this Appellant would not suffer Article 3 treatment in Kabul. There is no objective evidence that the warrant would be acted on in that city."

He then suggests that the appellant might safely go to live with his sister in Samangan.

[43] Mr Devlin pointed out that paragraph 77 proceeds on the hypothesis that the appellant had been found credible and the arrest warrant genuine. On that hypothesis, the warrant afforded evidence of Commander A's existence. Moreover, the warrant ran in the name of the Transitional Islamic State of Afghanistan, Ministry of Interior,

Police Headquarters Province of Balkh. There was nothing to suggest that it was of limited territorial scope. Mr Stewart accepted the force of the point about the hypothesis on which paragraph 77 proceeded. He submitted, however, that the Immigration Judge was entitled to rely on the cases of *AM* and *AF*.

[44] We do not consider that we require to examine the issue of internal relocation in great detail. Much of what the Immigration Judge said on the subject sits ill with the hypothesis on which paragraph 77 proceeds. Moreover, we entertain some doubt as to the applicability of the guidance in *AM* and *AF* to a case in which Commander A's role is not directly as a military commander or "war lord", but rather as the aggrieved father of his daughter, M. It seems to us that, on the view which we have taken of the error in law committed by the Immigration Judge in dealing with the issue of the persecution of the appellant's brother-in-law by Commander A in Kabul, that error undermines his conclusion on the closely related issue of whether the appellant would be safe from such persecution in Kabul. We need only add that there does not, in our view, appear to be a sufficient evidential basis for the conclusion that the appellant would be safe with his sister in Samangan.

Result

[45] We have been persuaded that Mr Devlin's submission that the Immigration Judge fell into error of law is in parts well-founded, but in other parts ill-founded. We have rejected the attack on the Immigration Judge's testing of the credibility of the appellant's evidence by reference to the objective evidence. We have also rejected the submission that the Immigration Judge's treatment of the arrest warrant discloses an error of law. We are, however, for the reasons which we have explained, satisfied that the Immigration Judge fell into error of law in his treatment of the credibility and

plausibility of the detail of the appellant's account of his relationship with M, in his treatment of the evidence of the persecution of the appellant's brother-in-law, and on the related issue of internal relocation. It seems to us that those aspects of the Immigration Judge's reasoning played a material part in his over all conclusion that the appellant's claim must be rejected.

[46] In these circumstances we conclude that the appropriate course for us to adopt is to allow the appeal, set aside the determination of the Immigration Judge and remit the case to the Asylum and Immigration Tribunal for reconsideration by a differently constituted tribunal.