



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

Appeal Number: DA/01868/2014

THE IMMIGRATION ACTS

**Heard at Newport
On 20 October 2015**

**Decision & Reasons Promulgated
On 29 October 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**FH
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Nollet

For the Respondent: Mr M Diwaycz, Home Office Presenting Officer

REMITTAL AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant who claims asylum. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court in order to protect the anonymity of the appellant who claims asylum.

Introduction

2. The appellant is a citizen of Afghanistan who was born on 1 April 1993. He came to the United Kingdom as an unaccompanied child on 16 March 2007. His claim for asylum was refused but he was granted discretionary leave to remain as an unaccompanied minor. That leave expired without the appellant seeking to extend it.
3. On 24 January 2011, the appellant was involved in a fight between Dari and Pashtu men in the UK. As a result, a Pashtu man was killed and on 14 December 2011 the appellant was convicted at the Maidstone Crown Court of manslaughter. He was sentenced to five years' detention in a Young Offender Institution.
4. On 24 January 2012, the appellant was notified that he was liable to deportation under the automatic deportation provisions of the UK Borders Act 2007 and was invited to make representation why he should not be deported. The appellant subsequently made representations on 25 January 2012 which was treated by the Secretary of State as a human rights claim.
5. On 26 September 2014, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and under the European Convention on Human Rights, in particular Article 8. On that date, the Secretary of State also made a decision that s.32(5) of the UK Borders Act 2007 applied as the appellant did not fall within any of the exceptions in s.33 of that Act.

The Appeal to the First-tier Tribunal

6. The appellant appealed that latter decision to the First-tier Tribunal. In a determination promulgated on 12 June 2015, Judge Powell dismissed the appellant's appeal on asylum and human rights grounds and also under Article 8 of the ECHR.
7. First, having concluded that the respondent's certification under s.72 of the Nationality, Immigration and Asylum Act 2002 could not stand as the presumption that the appellant had been convicted of a particularly serious crime and was a risk to the community had been rebutted, Judge Powell went on to dismiss the appellant's appeal on asylum grounds. Judge Powell was not satisfied that the appellant had established that he would be at risk on return to Afghanistan as a result of a 'blood feud' stemming from the killing of the Pashtu man of whose manslaughter he had been convicted. Secondly, Judge Powell was satisfied that the appellant's removal would not breach Article 8 of the ECHR.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal against the judge's decision to dismiss his appeal on asylum grounds. Further, it was argued that the judge had erred in law by failing to consider the appellant's humanitarian protection claim under para 339C of the

Immigration Rules (and Article 15(c) of the Qualification Directive). No challenge was made to the judge's decision to dismiss the appeal under Article 8.

9. On 7 July 2015, the First-tier Tribunal (Judge Astle) granted the appellant permission to appeal.
10. On 16 July 2015, the Secretary of State filed a response under Rule 24 seeking to uphold the judge's adverse decision on asylum grounds and arguing that the judge had not materially erred in law in failing to consider the appellant's claim under Article 15(c) of the Qualification Directive.
11. Thus, the appeal came before me.

The Submissions

12. Ms Nollet, who represented the appellant relied upon the four grounds of appeal which she developed in her written skeleton argument and her oral submissions.
13. First, she submitted that the judge had failed to make any finding on whether the appellant's action had triggered a blood feud.
14. Secondly, she submitted that in assessing the risk to the appellant the judge had failed to follow the structured approach to determining whether there was a risk from a blood feud set out in the UNHCR's documents: Position On Claims For Refugee Status And The 1951 Convention Relating To The Status Of Refugees Based On A Fear Of Persecution Due To An Individual's Membership Of A Family Or Clan In A Blood Feud (17 March 2006) especially at para 6 (set out at para 7 of the grounds of appeal). Further, the judge had failed to consider the risk to the appellant as a result of a blood feud without considering the Landinfo report, Afghanistan: Blood Feuds, Traditional Law (Pashtunwali) And Traditional Conflict Resolution (2012) at pages 23-44 of the appellant's bundle. In particular, she relied upon passages set out at para 12 of the grounds dealing with blood feuds and the possibility of "collective responsibility" among the Pashtu group. She submitted that the judge had been wrong to characterise the appellant's fear to be limited to that of the "cousin of the man he stabbed in the United Kingdom" (see para 37 of the determination) and even to that individual's family. The appellant's claim was, she submitted, that he feared a broader risk from Pashtuns and she referred me to para 21 of the appellant's witness statement dated 13 February 2015 to that effect.
15. Thirdly, Ms Nollet submitted that the judge had made inconsistent findings in paras 43 and 48 of the determination. In para 43 the judge had accepted that the appellant had been warned, "that he will 'be sorted out' wherever and whenever he is released". However in para 48, the judge, in finding that it was not reasonably likely that the appellant would face any risk of harm in Afghanistan, stated that:

“There is insufficient evidence to show that the victim has family in Afghanistan or would be in a position to carry out a threat which has not in fact been made against the appellant or that that family will be willing to take the risks ... to prosecute such a threat.” (emphasis added)

16. Ms Nollet submitted that that the emphasised words were inconsistent with the judge’s acceptance of the threat to “sort out” the appellant, “wherever and whenever he is released”.
17. Fourthly, Ms Nollet submitted that the judge had failed to explain at paras 43 and 44 of his determination why as a result of the warning he identified in para 43 that risk was more realisable in the UK than in Afghanistan particularly given that in para 44 he had stated that the risk was more “obviously realisable in the United Kingdom ... if he comes into direct contact with members of the other Pashtu group” (emphasis added). Ms Nollet submitted that the judge had failed to give adequate reason as to why that risk would not arise if he came into direct contact with members of that group in Afghanistan also.
18. Fifthly, Ms Nollet submitted that the judge had failed to give adequate reasons at para 50 of his determination for concluding that the Afghan police would provide a “sufficiency of protection” given that the judge accepted that the Afghan police were prone to corruption and may have greater priorities than protecting the appellant from the adverse interests of the victim’s family. Ms Nollet submitted that the judge could not simply state that she accepted what was said in the respondent’s refusal letter that there was a “functioning police force” in Afghanistan.
19. Finally, Ms Nollet submitted that the judge had failed to make any finding under Article 15(c) of the risk to the appellant of harm arising from indiscriminate violence as a result of the armed conflict in Afghanistan. She submitted that the judge had been provided with background evidence referred to in the appellant’s skeleton argument before the First-tier Tribunal at para 43 *et seq* which postdated the country guidance case of AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC).
20. Mr Diwaycz on behalf of the respondent relied upon the Rule 24 response.
21. First, he submitted that the judge had considered whether the appellant was subject to a “blood feud” by considering whether he would be subject to a “revenge killing”.
22. Secondly, he submitted that the judge had considered the relevant background evidence, including the report of Dr Giustozzi which the judge was entitled to reject.
23. Thirdly, he submitted that the judge had given sustainable reasons for concluding that the appellant would not be at risk in Afghanistan.

24. Fourthly he submitted that the judge was entitled to find that a sufficiency of protection would be provided to the appellant for the reasons given in the refusal letter.
25. Finally, he submitted that in relation to Article 15(c), although the judge had failed to consider it, on the basis of the country guidance case of AT the appeal would have been dismissed.

Discussion

26. In his determination, Judge Powell accepted a number of aspects of the appellant's claim. He accepted that the appellant's offence was committed against a background of inter-ethnic dispute in the UK and that the appellant had a fear of reprisals from a rival ethnic group, namely the Pashtu in the UK (see para 42 of the determination). The judge also accepted that the appellant had been warned, albeit indirectly, that he would "be sorted out" and that the threat was that would happen "wherever and whenever he is released". The judge also accepted that blood feuds occurred in Afghanistan.
27. However, the judge did not accept that there was a "specific risk to this appellant" in Afghanistan (see paras 47 and 48).
28. In reaching his adverse finding, I accept the substance of a number of Ms Nollet's submissions that the judge erred in law and his finding cannot stand.
29. First, although he rejected the expert evidence of Dr Giustozzi, and no challenge is made to that, the judge made no reference to the Landinfo report, in particular s.4 at pages 30-33 of the appellant's bundle dealing with "blood revenge/feuds." That report identifies that a blood feud may exist within a "victim's kin group" and that a "collective responsibility to take revenge and contribute to restoring honour" can arise. In addition, that is said within the context of blood feuds or "blood revenge" being part of the "Pashtu tradition". There is, in my judgment, at least an argument that this material provided support to the appellant's broader claim to fear not simply the victim's family but also other Pashtu. The judge failed to take this into account and, I accept Ms Nollet's submission, he did not consider the wider threat which was part of the appellant's evidence.
30. Secondly, having found that the threat to the appellant was, as the judge put it in para 43 of his determination, that he would be sorted out "wherever and whenever he is released", it is not clear to me the basis upon which the judge found that that risk could not extend to Afghanistan. His conclusion in paragraph 44 that the risk was "more obviously realisable in the United Kingdom" whilst self-evidently the case whilst the appellant was in the UK, did not exclude the possibility of the threat being carried out in Afghanistan. That is particularly supported, as Ms Nollet

submitted, by the judge's observation, albeit in the context of the UK, that the risk was "more obviously realisable" in a situation where the appellant "comes into direct contact with members of the other Pashtu group." The basis for the judge's conclusion in para 47 is not clear that: "The indirect threats made against the appellant ... I find to be focused on his prospective return to the town in England, where he committed the index offence."

31. The judge's conclusion in para 48 that it was: "Not reasonably likely that the appellant will face a real risk of harm in Afghanistan from the victim's family" is based upon an absence of sufficient evidence to show that the victim has family in Afghanistan or that they would be in a position to carry out the threat. To reach that conclusion, the judge should have considered all the background evidence, in particular the Landinfo report concerning the prevalence and nature of blood feuds. Whilst I do not accept Ms Nollet's submission that in order to determine the risk the judge is required to apply in rote fashion the guidance in the UNHCR document at paragraph 6, those factors are relevant and I am not satisfied that the judge, taking into account the background evidence, fully grappled with the evidence concerning the nature and intensity of blood feuds that can arise between ethnic groups from Afghanistan.
32. I agree with Ms Nollet's submission that in finding that the appellant had not established a risk to him in Afghanistan the judge in para 48 appears not to have considered his finding in para 43 that the threat was not, on its face, limited to the United Kingdom.
33. Finally, the judge's reasons for finding that there is a sufficiency of protection in Afghanistan in para 50 required more than him to state that he accepted the respondent's view in the refusal letter that there was a "functioning police force" in Afghanistan. In my judgment, the judge was required to grapple with the background evidence (which is by no means unresponsive of the appellant's position) particularly given that the judge stated that he saw "some merit" in the appellant's submission that the Afghan police were prone to corruption and might have greater priorities than protecting the appellant.
34. Whilst I do not accept Mr Nollet's submission that the Judge failed to find whether there was a 'blood feud' - he clearly did, on the basis of an accumulation of these reasons, I am satisfied that the judge's adverse findings of the appellant being at risk in Afghanistan and that there would, in any event, be a sufficiency of protection, are legally flawed and cannot stand.
35. As regards Article 15(c), the judge did not deal with this issue at all. Although the respondent had the country guidance case of AT in her favour, the appellant did rely upon more recent material to support the submission that the position had changed. As the appeal must be reheard, and given that the judge failed to make any findings in relation to Article 15(c), in my judgment on remittal the First-tier Tribunal must also

consider the appellant's claim under Article 15(c) if it is maintained. It will be for the First-tier Tribunal to consider whether there is cogent evidence and reasons for departing from the country guidance case in AT.

Decision

36. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal on asylum grounds involved the making of an error of law. That decision cannot stand and is set aside.
37. The decision to dismiss the appellant's appeal under Article 8 stands.
38. Given the nature and extent of fact-finding, and having regard to para 7.2 of the Senior President's Practice Statements it is appropriate to remit this appeal to the First-tier Tribunal for a rehearing.
39. The First-tier Tribunal's decision in respect of s.72 stands as does its decision to dismiss the appeal under Article 8.
40. On remittal, the First-tier Tribunal should consider the appellant's claim that his removal would breach the Refugee Convention and that he is entitled to humanitarian protection.
41. The appeal is remitted to the First-tier Tribunal on the basis set out above to be heard by a judge other than Judge Powell.

Signed

A Grubb
Judge of the Upper Tribunal