



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

Appeal Number: AA/11027/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 April 2016**

**Decision & Reasons
Promulgated
On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

**AA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moriarty of Counsel instructed by Luqmani Thompson & Partners Solicitors
For the Respondent: Mr N Bramble, Presenting Officer

DECISION AND REASONS

1. These proceedings result from a decision of the First-tier Tribunal following a hearing on 22 December 2015 against which both the appellant and the respondent have been granted permission to appeal.
2. The history of this matter is helpfully set out in paragraphs 3 and 4 of the decision of the First-tier Judge as follows:

- “3. The Appellant’s history is that he arrived in the UK in mid-2011 and claimed asylum on 31 October 2011. His claim for asylum was rejected by the Respondent in a decision dated 20 February 2012 but because he was then under 18 years of age and an unaccompanied asylum-seeking child, the Appellant was granted discretionary leave to enter and remain until 28 June 2013 when he was assessed to be 17 years and 6 months old. The Appellant appealed against the decision to refuse his claim for asylum and his appeal was heard by a judge of the First-tier Tribunal who, in a decision dated 4 April 2012, dismissed his appeal. The Appellant applied for permission to appeal to the Upper Tribunal, which was granted, and his appeal was heard on 28 August 2012. In a decision dated 17 September 2012 a deputy Judge of the Upper Tribunal dismissed the appeal. The Appellant then sought permission to appeal to the Court of Appeal, which was granted and his appeal was heard on 18 October 2013. The decision of the Court of Appeal dismissing his appeal was dated 11 December 2013. This was after the expiry of the discretionary leave which had originally been granted to the Appellant.
4. Meanwhile, because of the imminent expiry of his discretionary leave, the Appellant submitted an application on 3 June 2013 for further leave to remain in the UK. The Respondent rejected that application in a decision dated 3 December 2013, some eight days before the handing down of the decision in his appeal to the Court of Appeal. In respect of this second notice of rejection, the Appellant submitted a notice of appeal dated 16 December 2013 to the First-tier Tribunal under cover of a letter from his solicitors dated 17 December 2013. Meanwhile, he applied for and was granted permission to appeal to the UK Supreme Court against the decision of the Court of Appeal. That appeal was heard by the Supreme Court on 2 and 3 March 2015 and the decision of the Supreme Court was handed down on 24 June 2015. The appeal by the Appellant was dismissed, which brought to an end that sequence of appeals.”
3. The proceedings herein result from the decision of the respondent dated 3 December 2013.
4. The judge commenced by considering the findings made by the First-tier Tribunal on 4 April 2012 and referred to the principles in **Devaseelan [2002] UKIAT 00702**. The judge did not hear from the appellant who was not called to give evidence but did hear evidence given by a Mr J Horsman who worked for a specialist accommodation and support service for young people in social services care.
5. In reaching his conclusions the judge noted that the judge who had determined the appellant’s appeal on 4 April 2012 had found that the core of the appellant’s claim was not credible. It was found that the appellant’s family in Afghanistan were at the date of that decision likely to be all alive and well. The appellant did not have a well-founded fear of persecution but was an economic migrant and neither the Taliban nor the Afghan government authorities had any interest in the appellant.

6. The judge was invited to revisit the conclusions reached by the judge in 2012 in the light of evidence that the appellant had suffered from a learning disability but in the absence of an expert learning disability assessment the judge was not satisfied that the material before him showed any grounds other than for continued assessment nor was there anything shown of an additional factor which had not been taken into consideration in the previous determination. The evidence did not show new personal facts relating to the appellant which were of sufficient weight and clarity to allow him to depart from the principles set out in **Devaseelan**. The judge went on to consider the issue of tracing and did not find that the failure to undertake tracing enquiries was a weighty factor in support of the appellant's credibility requiring him to revisit the 2012 findings.

7. The judge then turned to consider the question of humanitarian protection and the submission that the country guidance case of **AK (Afghanistan) CG [2012] UKUT 00163 (IAC)** was out of date. The judge considered this submission and concluded his determination as follows:

"37. This Appellant says that he is from a remote mountain area in the eastern province of Nangarhar. The Respondent has not disputed that claim and proposes to remove him and return him to his family in the original home village. The situation in or around Kabul is not, therefore, relevant in this appeal. I have considered all of the references put before me by counsel for the Appellant as set out in the record of proceedings, although it is not necessary for all of them to be repeated in this decision.

38. At page FT194 of the Appellant's bundle B there is a report from the United Nations Assistance Mission in Afghanistan (UNAMA) and the United Nations Office of the High Commissioner for Human Rights (UNHCR) dated February 2015 considering the year 2014. In the executive summary on page FT207 the report describes the civilian loss of life and injury in Afghanistan in 2014 as "reaching unprecedented levels" with over 10,500 civilian casualties, which includes a 25% increase in civilian deaths and a 21% increase in civilian injuries. These were the highest number of civilian deaths and injuries recorded by UNAMA since it began recording figures in 2009. In a graph on page FT236 UNAMA reported the highest number of deaths and injuries in the east of Afghanistan, including Nangarhar province, since their records began, second only to the civilian deaths and injuries in the south of Afghanistan. The report went on to give information about civilian casualties from ground engagements involving both pro-government forces and anti-government elements, which included incidents of crossfire deaths and cross-border shelling. On page FT217 of the bundle UNAMA reported that the early months of 2015 indicated that Afghan security forces and the Taliban "are determined to make the 2015 fighting season a turning point in the conflict" with more frequent and larger ground engagements, including the use of indiscriminate shelling and other weapons in civilian

populated areas. They expected that the number of civilian casualties will continue to rise in 2015.

39. From page FT528 the bundle includes a report from Dr Liza Schuster of the Department of Sociology, City University, London, dated 26 March 2015. From paragraph 41 of that report, on page FT538, Dr Schuster considers the situation in Nangarhar province. She notes that this is one of the nine provinces with significant poppy cultivation, which is admitted by the Afghan government to have doubled in scope since 2013. She reports views of key people that the security situation in Nangarhar had deteriorated, even to the extent that district chiefs in 16 towns were unable to visit their offices in official vehicles and had to use local taxis, effectively moving in disguise (paragraph 44). Dr Schuster set out particulars of attacks in Nangarhar in the early months of 2015 leading to civilian deaths and injuries.
40. The most recent operational guidance note on Afghanistan issued by the UK Home Office is dated February 2015 and was from page FT775 of the bundle. At paragraph 2.2.16 the OGN noted that the provision of state protection outside of Kabul or other main cities “might not be accessible due to the structural weakness of the security services”. At page FT815 there was a press release by the head of UNAMA dated 12 April 2015 which confirmed that in the first three months of 2015 civilian casualties from ground engagements had risen by 8% compared to the same period in 2014 which was, in its turn, the highest number of casualties in the equivalent period since records began in 2009. The press release did not identify individual provinces. I also bear in mind that the international coalition forces were almost all withdrawn by the end of 2014, leaving only a few US and UK service personnel engaged in training.
41. From page FT926 there was a copy of the Home Office country information and guidance on Afghanistan relating to the security and humanitarian situation dated August 2015. At paragraph 2.4.4 on page FT930 the view was expressed that the humanitarian situation in Afghanistan since the country guidance case of *AK* “has not deteriorated to the extent that it represents, in general, a real risk of harm country to article 3 of the ECHR” but that the facts of each individual case must be considered. At paragraph 2.5.7 it was reported that the worst affected areas for security-related incidents were southern, south-eastern and eastern regions with Nangarhar province being the most volatile, although the proportion of the civilian population directly affected by violence remains low. Finally, it was noted at the hearing of the appeal on 22 December 2015 that news reports in the principal UK newspapers and on the BBC that morning were reporting advances by insurgent forces against the key town of Sangin in Helmand province, which was part of a general escalation in the conflict between the insurgents and the Afghan government.
42. I am bound by the country guidance cases issues by the Upper Tribunal unless I receive cogent and credible evidence that the situation at the date of my consideration, which is the date of hearing of this appeal, is materially different. I take into consideration the decision of the Court of Appeal in *SG & OR [2012] EWCA Civ 940* which confirmed that

general position. I have looked carefully at all the background information with which I have been provided, which comes from authoritative and reliable sources and presents a consistent picture that the security situation throughout Afghanistan and particularly in the southern, south-eastern and eastern provinces, including Nangarhar, has substantially deteriorated since 2012. The reports by UNAMA show the significant consequences of that escalation in early 2015 after the withdrawal of most coalition armed forces and makes predictions of continuing deterioration in the security situation which most recent news reports indicate are likely to be true. Against that background information, which I accept as credible and reliable, I have reached the conclusion that the country guidance in AK is no longer authoritative for this appeal. I find that the background information demonstrates that the overall security situation in the province of Nangarhar has deteriorated to the extent that simply returning a person to that province, even to live in a rural location as this Appellant did, will be likely to place him at real risk of serious harm simply by his residence. I find that this Appellant is entitled to the benefit of the protection afforded by article 15(c) of the Qualification Directive.

Humanitarian Protection

43. I did not receive any additional submissions on behalf of the Appellant about his entitlement, if any, to humanitarian protection in the UK. In the light of the continuing authority of the findings by the First-tier Tribunal Judge as to the credibility of the Appellant, I find that he has not shown a real risk that in his individual case, his removal to Afghanistan will be in breach of his rights under article 3 of the ECHR and that he would be entitled to humanitarian protection. However, I have found that the Appellant is entitled to the benefit of article 15 (c) because of the general security situation.

Human Rights

44. In his skeleton argument, counsel for the Appellant argued that the removal of the Appellant would be in breach of his rights under article 8 of the ECHR and he set out for specific grounds. In his oral submissions, he did not add any additional details. In essence, counsel relied on the evidence from Mr Horsman, as supported by the Appellant's GP, that the Appellant would find it very difficult to reintegrate into Afghanistan and live independently because of his limited skills and lack of progress while in the UK. As I have concluded above, although I accept the views expressed by Mr Horsman as being honestly and reasonably put forward, the conclusion reached by the first Judge in his appeal was that his family most likely remains in Afghanistan and there was no reason why the Appellant should not rejoin them. The presenting officer made clear that it was the Respondent's position that the Appellant could go back to his family and that there was, therefore, no need to assess whether he could relocate to Kabul or any other part of the country. As I have concluded that I must begin my consideration with that judge's findings, it follows that I must find that the Appellant will return to his own family, into the rural agricultural life that he previously knew where his illiteracy and lack of urban life skills will not be a significant factor. I find that the

Appellant will be able to integrate into Afghanistan and that he does not meet, therefore, the requirements of paragraph 276ADE of the Immigration Rules.

45. In the light of the above conclusions I find that the decision appealed against would not cause the United Kingdom to be in breach of the law or its obligations under the Refugee Convention. I further find that the Appellant has not established his entitlement to humanitarian protection under paragraph 339C of the Immigration Rules HC 395.
46. In the light of the above conclusions, I find that the decision appealed against would cause the United Kingdom to be in breach of the law or its obligations under article 3 of the European Convention on Human Rights but not under article 8.

NOTICE OF DECISION

47. I dismiss the appeal on asylum grounds.
 48. I dismiss the appeal in respect of Humanitarian Protection.
 49. I allow the appeal on human rights grounds under article 3 of the ECHR."
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8. It will be observed that there is a difficulty with the construction of this determination. In the grounds of appeal Counsel refers to paragraph 48 of the decision where it is recorded that the judge dismissed the appeal in respect of humanitarian protection and submits that this must be a misprint. However there is an additional problem in paragraph 45 where the judge clearly records that the appellant has not established his humanitarian protection case under paragraph 339C.
 9. As I have said both sides were dissatisfied with the decision and permission to appeal was granted to the Secretary of State on 12 February 2016 in respect of the decision to allow the appeal on humanitarian protection grounds. Judge Perkins considered that while reasons had been given arguably these "are not sufficient to overcome the considerable weight that should be attached to country guidance. Arguably the mere fact that the evidence is more recent than the country guidance is not enough".
 10. In the grounds the respondent had referred to the case of **SG** relied on by the First-tier Judge and had set out paragraph 47 of that decision as follows:

"It is for these reasons, as well as the desirability of consistency, that decision makers and Tribunal Judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

11. In relation to the argument that the judge had misapplied the guidance set out in **Devaseelan** the First-tier Tribunal granted permission to appeal in a decision dated 5 February 2016. It was noted that evidence had been adduced from at least five health professionals including the appellant's GP that the appellant might be suffering from an undiagnosed learning disability which could explain the previous inconsistencies in his account. The First-tier Tribunal Judge referred to the argument that the Tribunal had made no reference to guideline 7 in **Devaseelan** where the Tribunal had said that the force of the reasoning underlying the guidelines 4 and 6 would be greatly reduced if there was some very good reason why the appellant's failure to adduce relevant evidence before the first Tribunal should not be held against him. The judge found it arguable that the First-tier Tribunal had erred in the light of all the evidence when he declined to visit the issue of credibility and he had failed to adopt a holistic assessment of credibility in the light of all the evidence. Both the appellant and the respondent filed responses opposing their respective arguments. Mr Bramble pointed out that the judge had stated in paragraph 27 that no expert learning disability assessment had been completed and the Tribunal now had the report of Dr Peter Maggs which might be relevant were the appeal to be remitted de novo. However he submitted that the judge had been entitled to conclude as he did on the material before him. He relied on his grounds of appeal and submitted that strong evidence had not been found for departing from the country guidance and little specific material had been identified. The decision was not sufficiently reasoned.
12. Mr Moriarty invited me to uphold the judge's decision on humanitarian protection grounds and to find that he had misdirected himself in respect of his findings on the appellant's credibility.
13. As I indicated at the hearing I find very considerable difficulties with this determination. It does appear clear on any view that where a country guidance case is to be departed from, great care is required. While the judge refers to the decision of the Court of Appeal in **SG** the wording in paragraph 47 of the case – reproduced in the respondent's grounds which I have set out above – does not appear to have informed the approach of the First-tier Judge who simply refers to the reception of “cogent and credible evidence” rather than “very strong grounds supported by cogent evidence”.
14. Standing back from the decision for a moment, the judge having found that the appellant would be at real risk of serious harm simply by virtue of his residence in Nangarhar went on in paragraph 44 of his decision when considering Article 8 issues to conclude that there was no reason why the appellant should not rejoin his family in that very province. He could resume his rural agricultural life with his own family. Having found this the judge then, as I have said, twice indicated he was dismissing the appeal on humanitarian protection grounds. It is extremely difficult to reconcile these various features. If the judge had indeed throughout intended to

allow the appeal on humanitarian protection grounds it is difficult to see how he could have expressed himself as he did in paragraph 44. He would either have made it clear that it was not necessary to deal with Article 8 or have made his findings expressly in the alternative. Coupled with what is said at paragraph 45 and 48 of the decision I believe that the problems cannot be dismissed as mere typographical ones. It may be that the judge changed his mind at some point in the drafting of the determination but whatever the position the outcome is unsatisfactory.

15. Insofar as the **Devaseelan** point is concerned, I am in agreement with the grounds that the judge made no reference to guideline 7 in **Devaseelan** in the light of the evidence given by Mr Horsman at the hearing referred to in paragraph 6 of the appellant's grounds. As argued in paragraph 11 the judge had applied the guidelines without calibrating them to the proper context of the case.
16. I have come to the conclusion that in the light of the concerns raised in the respective grounds of appeal as well as the difficulties raised by the apparently contradictory findings made by the judge in the concluding paragraphs of his decision, it would not be right to let this decision stand and the matter should be remitted for hearing afresh before a different First-tier Judge. The appeal is allowed accordingly. The anonymity order made by the First-tier Judge continues. None of the findings of fact are to stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 13 April 2016

G Warr
Judge of the Upper Tribunal