



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

Appeal Number: PA/00083/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 1 October 2018**

**Decision & Reasons
Promulgated
On 23 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MR K-D A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E A Mottershaw, Counsel

For the Respondent: Mr S Whitwell, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Malik dismissing his appeal against the decision of the respondent made on 12 December 2017 to refuse to grant him asylum in the UK.
2. The appellant is a citizen of Afghanistan born in 1992. He initially claimed asylum on 5 November 2013 in the UK, having he claimed to have left

Afghanistan in 2012. On 31 August 2011 the appellant was fingerprinted in Italy as part of an asylum claim and again on 24 November 2011. He then travelled to France where he stayed for twenty days. He then travelled to the UK on 5 November 2013. The appellant was detained and he stated he entered the UK on 1 April 2012, concealed in a lorry. On 15 January 2014 he was removed to Italy by third party proceedings.

3. On 27 November 2015 the appellant entered the UK again and provided false details. His asylum application was refused on 12 December 2017.
4. He claimed that he lived with his parents, two brothers and four sisters in Afghanistan. He had a twin brother Jamil and a younger brother Jamal. He never went to school as his father needed him to help him. His twin brother and younger brother attended a madrassa. He was born into a very religious family. His father was a member of the Taliban and was killed in a bomb attack. After his father's death, which occurred about 10 years ago, he became responsible for the family and worked on the land.
5. He said his brothers attended the madrassa six times a week and he believes from there they developed a liking for the Taliban. They became friends with men who were involved with the Taliban who would from time to time come to their house to eat. His mother and sisters were frightened someone would inform the government that the Taliban were visiting and they were afraid their house would be bombed by the Afghan army. His brothers would not listen. His twin brother had already joined the Taliban and participated in kidnappings of government members.
6. The appellant said in 2008 to 2009, the Taliban took control of his area and established checkpoints. At that time there was no pressure on him to join as his twin was already a member. He was strongly against his twin brother's involvement and tried to persuade him to cut his connections, but he would not listen.
7. In 2010 his twin did not return home. He made enquiries at the madrassa and was told his twin was in hiding and would soon return. After two days a family member living in the city called and told them that they had seen his twin brother on the TV news and that he had been caught by the government in Kabul. After a few weeks with his twin still in prison, a Taliban member told him the head of the Taliban said he must go to the mosque on Friday. He went and in front of all the people the head of the Taliban said he must take his twin brother's place. He said he could not refuse as his life would be in danger. He returned home, told his mother, who told him he should go. A week later he did not report to the Taliban and did not show up at the checkpoint. The Taliban came to his house and he asked for more days saying he would come. He never became a Taliban member officially and never participated in any action. His brother-in-law found him an agent who sent him to Iran and then he arrived in the UK.

8. He said that his twin brother was in prison for four years until 2014. On return to the village, his twin brother resumed working for the Taliban and became the head of the Taliban in the village. His twin brother was married for 25 days before being killed in action. He was in the UK at the time and his brother-in-law told him of the death and sent photographs via e-mail.
9. He said he and his twin brother were always together and close. He was scared of being sent back and his depression worsened. His mother said he must go back and marry his twin brother's widow, which he said is a part of the culture in Afghanistan. He said he could never do that and as his twin brother was a member of the Taliban, if he refused, he would be killed by them or by his widow's family. His widow continued living with his family. Her father would not take her back and she would not be allowed to marry anyone else.
10. After his twin brother's death, his younger brother went to Iran and disappeared. They later found out that he was in prison for two years before being deported to Afghanistan. His younger brother returned to the village, joined the Taliban and was killed 40 days later at the beginning of 2017.
11. The appellant said he did not have any health issues in Afghanistan but he now suffers from depression and has been on medication since 2015. His health will deteriorate if the counselling he is currently receiving is stopped. He would not be able to cope.
12. The judge said that at the start of the hearing she was provided with a further report by Mr Zadeh. It was submitted that effectively this was the same report as provided in the appellant's bundle, with the exceptions of additional paragraphs 37 to 45. The amended report was also dated 23 May 2018, the same date as the first report. The judge said she was also shown footage of what was said to be the appellant's twin brother's funeral and photographs of his younger brother.
13. The judge did not consider it reasonably likely that the appellant was at risk on return to Afghanistan for any claimed involvement either by his brothers or himself with the Taliban or from the state authorities. Her findings are set out at paragraphs 40(i) to (viii).
14. At 40(i) the judge found discrepancies between the appellant's screening interview where he had said he and his family were members of the Taliban and that because government forces were after ex-members of the Taliban and arresting and incarcerating them, his life was in danger. However, he now denied he was a member of the Taliban and that the risk to him from state authorities was because he fed and accommodated Taliban members, although his siblings and father were members. The judge held even taking the appellant's claim at its highest that his twin brother was incarcerated by the government for four years, there was no

reasonable explanation as to why the authorities did not come to his house after his twin brother's arrest, given that his evidence was that his twin brother's arrest was on TV.

15. At 42(ii) the judge said the report of Mr Zadeh said if a husband dies a widow has to marry another family member and it is also possible to marry family members, such as a cousin. The judge did not find it reasonably likely that the appellant would be at risk of a forced marriage or return to Afghanistan. She did not believe that his mother would say that he had to return home to marry his deceased twin brother's wife as this would place the appellant, on his own account, at risk from the Taliban and the state. Furthermore, given that it is the appellant's claim that his mother had lost two of her sons through their involvement with the Taliban and her husband was killed in a bomb attack, she did not find it reasonably likely that she would now also place her remaining son at risk.
16. In the light of the documentary evidence including the photographs provided by the appellant, the judge at 42(iii) accepted that the appellant and his twin brother were related in view of the likeness between them. However this did not lead her to find to the lower standard that the individuals in the photographs/video were members of the Taliban. Whilst she accepted that some of the photographs showed the individuals in the company of others and/or in possession of weapons, given the appellant's lack of credibility on his first and second arrival in the UK regarding who he was, his status in the UK, and the contradictory evidence regarding whether he had been educated at school or not, she did not accept that the appellant's siblings were members of the Taliban. Even if she was wrong in this finding, and his siblings were indeed members of the Taliban, there was nothing to suggest given his claims that his twin was released by the authorities after four years, that his twin was of any interest to them. Consequently she found that the appellant would not be of interest to them either.
17. The judge at 40(iv) considered the appellant's account that he was effectively able to stall the Taliban due to his family matters. She noted Mr Zadeh's report at paragraph 37 that "he had not been able to find an independent source to comment on the circumstances of the Taliban recruitment in the case of the appellant and the excuse/moratorium he sought to look after his mother. Therefore, this section of his report was based on the appellant's statements and Mr Zadeh's knowledge of the Pashtun communities in Afghanistan." The judge considered Mr Zadeh's assertion *that it is highly plausible that the Taliban did approach the appellant to join them in place of his twin in view of the coercive methods the Taliban use in recruiting members among their co-ethnic Pashtuns. When a Pashtun family is known to the Taliban, it is the Taliban's practice to recruit as many people from the family as possible. Often it is the father, uncles, brothers and cousins who were targeted for recruitment*". Yet, as held by the judge, it was the appellant's claim that his brothers-in-law were not members of the Taliban. The judge also considered Mr

Zadeh's assertion that due to the effective control of the district in which the appellant lived, the Taliban members thought that the appellant would not escape. The judge did not find it reasonably likely that the appellant would have taken the risk of escaping given that he was leaving behind his younger brother and family members if it would have been known to him that in his absence he would have effectively been condemning his younger brother to joining the Taliban. The appellant's evidence was that the Taliban set up checkpoints in the area, yet it appears he was able to leave without any difficulties from the Taliban or the state. She did not find it reasonably likely that the appellant would have been able to escape without coming to their attention.

18. The judge held at paragraph 40(v)

"Mr Zadeh also speaks of the culture of Pashtun men giving their promise and this has the unique application and for some is highly valued. This is provided as a rationale as to why when the appellant asked for more time, the Taliban did not reject his request as it would be seen as 'unmanly' - but I find these concepts without objective evidence to support it - given my credibility findings, does not take his claim any further - more so it is predicated on the appellant's account which I find is not reasonably likely to have occurred."

19. The grounds upon which Ms Mottershaw relied on submitted that although the judge noted what Mr. Zadeh said at paragraphs 44 and 45 of his report, her findings at paragraph 40(v) were flawed. Ms Mottershaw submitted that the judge reached credibility findings at 40(v) without regard to the expert report. Further the judge considered that the fact that the report was "predicated on the appellant's account, reduced its weight." This was contrary to case law on the holistic approach to be taken to expert evidence. It was argued that the judge placed weight on the absence of objective evidence. She failed to take into account that the expert report itself was objective evidence. The expert understood his overriding duty to the court and his need for independence. Ground 3 argued that further to ground 1, it was incorrect to consider the expert's comments on this particular issue - a cultural norm - were predicated on the appellant's account. They were clearly the expert's opinion on relevant culture and were not based on the appellant's account.
20. Ms Mottershaw relied on the decision in **Mibanga v SSHD [2005] EWCA Civ 367** where the Court of Appeal emphasised the importance of considering medical evidence relevant to credibility as part of the process of reaching a conclusion as to credibility. The Court of Appeal said the Adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence.
21. Ms Mottershaw said that her grounds also referred to **SA (Somalia) EWCA Civ 1302** where it was held that the expert report should be

considered as part of the whole package. The key aspect of the appellant's claim is that he was given extra time by the Taliban. By placing weight on the expert report being predicated on the appellant's account (referring to paragraph 40(v)), reduced the weight the judge attached to the expert report. Ms Mottershaw submitted that inevitably the report would have some basis on the appellant's account. She relied on **R (AM (Angola)) v SSHD [2012] EWCA Civ 521** where the Court of Appeal considered whether basing a report on the appellant's own account undermined its status as independent evidence. The Court of Appeal held that refusing the expert report because it sets out the account of the applicant takes away the important meaning of policy. A requirement of "evidence" is not the same as a requirement of proof, conclusive or otherwise. Whether evidence amounts to proof, on any particular standard is a matter of weight and assessment.

22. Ms Mottershaw said that the expert report's evidence was based on the appellant's account in one section and his report on the cultural background was his own opinion and was not predicated on the appellant's account. Ms Mottershaw submitted that the judge was mistaken in finding that she required background evidence because this was an expert report which was independent evidence. The judge was wrong to say that the report was predicated on the appellant's account.
23. Mr. Whitwell submitted that the judge made credibility findings in the context of the expert report.
24. I find that the judge's findings at paragraph 40(v) have to be read in conjunction with her findings at 40(iv). At 40(iv) the judge took notice of what Mr. Zadeh at paragraph 37 of his report. Mr. Zadeh said therein that he had not been able to find an independent source to comment on the circumstances of the Taliban's recruitment of the appellant and the excuse/moratorium he sought to look after his mother. Mr. Zadeh said that in the circumstances, that this section of his report was based on the appellant's statement and Mr. Zadeh's knowledge of the Pashtun communities in Afghanistan. It is noteworthy that the judge's findings at 40(iv) have not been challenged.
25. I find that the judge's findings at paragraph 40(v) are in respect of one aspect of the appellant's claim, namely the culture of a promise given by a Pushtun man and the high value placed on this culture such that it would have appeared as unmanly if the Taliban had rejected the appellant's request for extra time to look after his mother before joining them. I find that Mr. Zadeh's report on this matter was indeed predicated on the appellant's evidence. I find that Mr. Zadeh was explaining the cultural background to the appellant's evidence based on his own knowledge of the Pushtun communities in Afghanistan. Where the judge went wrong was, as submitted by Ms Mottershaw, her failure to accept this part of Mr. Zadeh's report as independent evidence in the absence of objective

evidence to support his views. Nevertheless, I find that this error does not materially affect the whole of the judge's decision.

26. The judge found that in the light of her credibility findings those concepts did not take the claim any further. She did not find the appellant's account credible and did not find it reasonably likely that his account of asking for more time and it being granted by the Taliban to have occurred.
27. I find that the judge took a holistic approach to the expert evidence. She did not artificially separate the expert report from the rest of the appellant's evidence. She reached conclusions as to the credibility of the appellant's evidence with reference to the expert report.
28. Ms Mottershaw raised an issue which she had not raised in the grounds. This issue was in respect of internal flight relocation. She said the grounds focused mainly on the risk to the appellant in his home area and not in Kabul. Because the judge has not fully taken account of the expert report, the overarching argument is that the appellant would also be at risk in Kabul and the judge's finding on this issue was flawed.
29. I note that at paragraph 45 the judge said there was nothing to suggest that the appellant could not seek the assistance of the family in Afghanistan even if he chose not to return to his home areas and relocate to Kabul. Whilst the appellant's mental health is a factor, there was nothing to suggest that he was physically unwell. He previously worked in Afghanistan and there was nothing to suggest he could not do so again.
30. Ms Mottershaw did not explain what evidence there was in the expert report that undermined the judge's findings at paragraph 45. Her submission was vague and not particularised. She drafted the grounds and if the judge's findings at paragraph 45 were deeply flawed, she would no doubt have said so. She did not. I got the impression that she raised this issue at the last minute for good measure.
31. I find that the judge's decision dismissing the appellant's appeal shall 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.

Signed

Date: 18 October 2018

Deputy Upper Tribunal Judge Eshun