



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/05033/2017

THE IMMIGRATION ACTS

Heard at Manchester  
On 27 April 2018

Decision given orally at hearing. Sent out  
On 22 June 2018

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

MR A M

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, instructed by Duncan Lewis & Co Solicitors  
(Harrow Office)

For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Afghanistan with an assessed or assigned date of birth of 1 January 1987. He arrived in the United Kingdom in 2005. He claimed asylum. There have been a number of previous claims and appeals previous to this one.
2. The appellant has a partner or ex-partner and two small children. The appellant also has a conviction for a criminal offence for which he received a sentence of six months' imprisonment and was recommended for deportation. The recommendation for deportation has not been carried for various reasons but the most recent decision by the Secretary of State was to refuse a protection claim which was put up as a reason why the deportation should not now take place. That brief statement of the facts is enough to show that this case is capable of raising considerable complications and it is

fair to say that those acting on the appellant's behalf have done their very best to raise every point which might properly be raised in the appellant's favour.

3. The matter came before Judge Morris in Manchester in November 2017 and in his decision dated 13 December 2017 he dismissed the appellant's appeal on all grounds. There was an application for permission to appeal to the Upper Tribunal essentially on asylum grounds and permission was granted largely as I understand it because the judge granting permission simply could not understand the logical process by which the judge had determined that the appellant was not at risk of persecution. In an attempt to amend the grounds put in yesterday Mr Bandegani on the appellant's behalf sought to raise in addition grounds based on Article 8, some of which depend on circumstances which have occurred since the judge's decision.
4. It is convenient to look first at the asylum grounds as they were before the judge and as they are before the Upper Tribunal because if the appellant succeeds on those grounds it is not necessary to make a decision on any of the others. Regardless of the other difficulties which the appellant may suffer in attempting to persuade anybody of his merits or his honesty, there is no doubt that the appellant is an Afghan national and that he is Hazara, a Shiite and from Ghazni, in particular in the Jaghori district. The case put on his behalf today as it was put to Judge Morris is that those features are sufficient to make him a refugee. When one adds to that the fact that there are also some mental difficulties arising from a diagnosis of PTSD and depression he is a person who cannot be expected it is said to relocate in Afghanistan, specifically to Kabul.
5. In determining whether the appellant's characteristics were sufficient to establish his asylum claim the judge looked at country guidance from 2009 on Hazaras, that is to say MI [2009] UKIAT 00035 where as the judge said the Tribunal held that a person of Hazara ethnicity is not likely to be at real risk of serious harm in Afghanistan by reason of that factor alone. The judge also quoted a European Court of Human Rights application to the same effect and from the same period. The judge went on in paragraph 73 of his determination to indicate that it would be an error of law not to follow the country guidance decision absent some cause to the contrary. The judge then said at paragraph 74 that looking at all the evidence as a whole the appellant "has failed to satisfy me even to the lower standard of proof that he is at real risk upon return to Afghanistan". The grant of permission indicates the difficulty in discovering how the judge managed to get from consideration of the issue of Hazara ethnicity alone and as it was in 2009 to the question of whether the appellant, with all his characteristics, is at risk in 2017. That is particularly in view of the fact that there were before the judge at least two reports indicating that the situation for Hazaras in Afghanistan is extremely fluid and had got substantially worse over the last five or six years. It seems to me clear that paragraph 74 as a conclusion on the appellant's circumstances as a whole does demonstrate an error of law. The judge failed to take into account all that was being said on behalf of the appellant in reaching the conclusion that he did. It is appropriate in those circumstances to set aside the judge's determination.

6. I then need to look to determine whether the material before the judge was such that it is possible and appropriate for me now to re-determine the issue. The question is not, as Mr Bates sought to argue, purely whether the appellant would be safe from persecution on return to Kabul, the destination the Secretary of State selects for him. The question in determining a refugee status appeal is first of all whether the appellant is at risk of persecution in his own home area and, if he is, whether it is reasonable to expect him to relocate to some other part of that large country, Afghanistan.
7. Looking at the first question the judge was entirely right in his summary in paragraph 73 of the obligation to follow country guidance absent good cause to the contrary but the truth of the matter is that in this case there was more than arguably good cause to the contrary. The new material showed or purported to show a substantially increased risk to Hazara Shiites in the period after the date of the country guidance in 2009. To that extent the evidence in relation to Hazara Shiites was perfectly clear and entirely in the appellant's favour. What there was or might have been against it is a report extracted in the refusal letter. The source of the report is the Australian Government's Department of Foreign Affairs and Trade. The report was dated 8 February 2016 and specifically relates to Hazaras in Afghanistan. That report is itself by no means favourable to a lot of Hazaras. It specifically indicates the very substantial risks that they face in almost all parts of the country and in travelling around it. The Pashtun majority districts are not said to be safe for them. The areas controlled by the Taliban are not safe. What is said about Kabul is this at paragraph 2.24 of the report, 66 of the letter:

"Most areas of Afghanistan outside of Kabul and the Hazara generally have high levels of insecurity and are considered dangerous for people of all ethnicities including Hazaras. DFAT assesses that Hazara minorities living in Pashtun-majority areas across Afghanistan are less safe than those living in Kabul or Hazara-majority areas."

8. That does indicate of course that Kabul is safer than perhaps any of the other areas which have been the subject of specific evidence but it does not show that the appellant is to be regarded as not at risk in his home area, an area specifically dealt with by one of the reports, that of Emily Winterbottom, and supported to some extent by that of Professor Maley in a report again specifically on Hazaras. The question whether there was good cause to the contrary in relation to the country guidance is something which in my judgment could admit only one answer. In the context of the materials before the judge there was every reason to consider very carefully whether the country guidance of 2009 should be departed from on the basis of the specific evidence before the judge. As I read that evidence, despite the perhaps slightly more measured text of the Australian Government's report the clear impact of it is that in the appellant's home area he would be at risk of persecution as a Hazara Shiite. The impact of that evidence is of itself good reason in this case bearing in mind the evidence that is before the Tribunal to depart from the country guidance and I do so. I do so, and I find that the appellant is at risk of persecution in his own area. That is not of course sufficient to establish him as a refugee. The question then is whether it is reasonable to expect him to live in some other part of Afghanistan.

9. That question is not answered solely by identifying a part of Afghanistan in which he would be safe. In order for it to be an appropriate destination for relocation the appellant not only would need to be safe but it would need to be a place that he could reasonably be expected to live. The evidence to which I have already referred does admittedly show that Kabul is safer than other areas but neither that nor the most recent country guidance AS [2018] UKIAT 00118 shows that Kabul is a place which is generally sufficient as a place for relocation of those who are at risk of persecution in other parts of Afghanistan. Like much of the other material with the exception of the 2009 case to which I have already referred it is not about the minority Hazara Shiites, it is about the general circumstances of an individual who claims that although if he had remained in Afghanistan he might not be subject to any risk. He is now at risk as a returnee from the west, having been away quite a long time as an asylum seeker.
10. The material relating to Hazaras in Kabul is in my judgment sufficient to enable the appellant to show in this case that it would not be an appropriate venue of relocation and residence for him. I draw that in particular from the fact that even in the Australian report relied on by the Secretary of State there is no suggestion that Kabul is actually safe and in the more detailed consideration of the issue in the reports of Emily Winterbottom and Professor Maley it is specifically asserted that Kabul is dangerous.
11. I do not purport to be issuing country guidance by reaching those conclusions in this case. This is simply the position which I reach on the evidence limited as it is before me as it was before the judge. It seems to me however that the conclusion is inevitable, that on the evidence before the judge and indeed before me the appellant has established that he is a refugee within the meaning of the 1951 Convention. It follows from that firstly that his appeal against the decision to deport him succeeds. It follows also that it is unnecessary to consider any of the other grounds raised on his behalf.

C. M. G. OCKELTON  
VICE PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER  
Date: 25 May 2018