



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10374/2017

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 11<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 02<sup>nd</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

AA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Semega-Janneh of Counsel, instructed by NLS Solicitors  
(Cardiff)  
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. In this protection claim matter I had previously dealt with an error of law hearing on 14<sup>th</sup> May 2018. I had been persuaded at that hearing that there was a material error of law in the First-tier Tribunal Judge's decision and I had concluded that there had to be further consideration of the issue of internal relocation. I had set out those directions which needed to be complied with including the filing and service of any further evidence and a skeleton argument both from the Appellant but also from the Respondent. Unfortunately, and regrettably neither side have complied with the

directions. I have been provided today with a skeleton argument on behalf of the Appellant and although an expert report has been posted to the court under cover of a letter of 4<sup>th</sup> July it only made its way to me just before the short adjournment today. The report itself is dated 11<sup>th</sup> June and it is unfortunate that it was not sent to the Tribunal in compliance with the directions in time.

2. I have not had anything by way of a skeleton argument from the Respondent despite my order being in mandatory terms and not an invitation that the Respondent shall file and serve a skeleton argument and any background material. I was given a copy of the country guidance case of **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)**.
3. As a consequence of the non-compliance of the directions this case has taken longer to be heard than ordinarily would have been the case and it has taken longer for me to consider the various documents both in court and outside the court before today and I hope that in the future that both sides will understand that when the Tribunal makes directions they are not an "optional extra". The Tribunal's directions have to be complied with. It was also disappointing that Counsel for the Appellant did not have the expert report that his instructing solicitors had relied on and had sent to the Home Office and sent to the Tribunal. The case had to be put back for it to be ready to proceed.
4. In any event, turning to the substantive matters, I can summarise things as follows. I had found at the hearing on 14<sup>th</sup> May as follows at paragraph 10 when I said that in virtually all respects this Appellant's account was accepted and it was not a minor matter that he was kidnapped and seriously mistreated by the Taliban but that he was fortunate enough to have escaped. It was also highly relevant that he worked at Camp Bastion. He would therefore be seen as a traitor by the Taliban and perhaps others. In the circumstances, my judgment was that this case required a careful analysis of the issue of internal relocation and that although I had taken on board the issues of the burden of proof which were raised by the Presenting Officer it was necessary for the analysis of the background material to be undertaken properly. That was a reason why I provided the directions that I had.
5. The legal position can be succinctly put. Firstly, by virtue of Article 1A(2) of the Refugee Convention, a Refugee is a person who is out of the country of his or her nationality and who owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is unable to avail himself of the protection of the country of origin. It is said in this case on behalf of the Appellant that the issue here is fear and a risk from non-state actors, in particular from the Taliban.
6. Insofar as the issues of internal relocation are concerned I shall set out briefly what I had previously set out in my Error of Law Decision, namely that the Tribunal has to follow House of Lords decision in **Januzi v Secretary of State for the Home Department [2006] 2 AC 426** and the subsequent House of Lords decision in **AH (Sudan) v Secretary of State for the Home Department [2008] 1 AC 676**, and, as I

explained, I am very familiar with both of those cases but it is worth setting out what was said by Lord Bingham at paragraph 21 in **Januzi**:

“The decision maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. ... There is, as Simon Brown LJ aptly observed in **Svazas v Secretary of State for the Home Department [2002] 1 WLR 1891**, paragraph 55, a spectrum of cases. The decision maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. ... All must depend on a fair assessment of the relevant facts.”

7. Lord Hope had said at paragraph 47 as follows:

“The question where the issue of internal relocation is raised can, then, be defined quite simply. ... It is whether it would be unduly harsh to expect a claimant who is being persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words ‘unduly harsh’ set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there”,

and then in **AH (Sudan)** Lord Bingham again considered his own judgment in **Januzi** and said that the observations he made were, “plainly of general application. It is not easy to see how the Rule could be more simply or clearly expressed.”

8. Lady Hale at paragraph 20 considered the UNHCR’s approach where it had said as follows:

“The correct approach when considering the reasonableness of internal relocation alternative is to assess all the circumstances of the individual’s case holistically and with specific reference to the individual’s personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship.”

9. I remind myself of the burden and standard of proof, again, with which I am very familiar. The burden of proof of course is on AA himself. His appeal is to be decided on the lower standard, which is less than the civil standard of proof. It has been variously described as a reasonable chance, a serious possibility or substantial grounds for believing and the question is whether in the circumstances this Appellant has been able to show the Tribunal to the required standard that internal relocation would be unduly harsh or unreasonable for him.

10. Insofar as the background facts are concerned I adopt those from FtT Judge Birrell’s decision when she had set out the following at paragraph 56 when she said, referring

to the Appellant: "I conclude that he has met the evidential burden of establishing that he worked at Camp Bastion, was targeted by the Taliban while living in Kabul, kidnapped, mistreated and escaped from his detention." The judge also said at paragraph 57:

"I therefore accept on the basis of the Appellant's account that he cannot return to Kabul. That was where he lived when he was targeted and kidnapped previously and therefore there must be a risk of that kidnapping happening again if he was to live there."

Then the judge went on to conclude that internal relocation was a viable alternative for this Appellant but, as I have explained, the judge did not take into account all of the evidence which had been submitted at the time.

11. Now, there is an aspect of the case which becomes relevant relating to the country guidance case of AS. That was promulgated on 23<sup>rd</sup> March 2018 and although Mr Bates, the Senior Presenting Officer who appeared in front of me at the previous error of law hearing, sought to argue that I could take that into account for the purpose of the error of law hearing I had refused to do so. However now that I have found an error of law I see no basis upon which it can be properly argued that the country guidance case of AS cannot be taken into account. It does pose the issue of the judge's finding as to risk on return in a category of case which requires careful assessment.
12. In my judgment, Judge Birrell did reach a factual conclusion properly reasoned and evidence that the Appellant was at risk on return because of his particular circumstances in Kabul and that was because of the kidnapping and because of what happened to him specifically and no grounds were put forward in time to suggest that she, the judge, had reached the wrong conclusion. At a later stage a Rule 24 response was advanced once AS had been promulgated to contend that Judge Birrell was wrong.
13. In my judgment, the factual matrix which has been put forward within the country guidance is different to the law which is declared, for example by the Court of Appeal. That is because when the Court of Appeal hands down judgment it is declaratory of what the law always was whereas when the Upper Tribunal hands down, or rather promulgates, its decision on a country guidance case it is in respect of and indeed in the main a factual promulgation, not a legal promulgation and thereby not declaratory of law but declaratory of fact at that particular time. So, in the circumstances, in my judgment, it is not open to the Secretary of State to go behind the findings of Judge Birrell when she said that this Appellant would be at risk on return in Kabul.
14. In any event, if I am wrong about that I will go on to consider the issue of risk on return to this Appellant in Kabul. The evidence that I am invited to take into account includes the expert report, which, as I say, had been provided to me today. There is a detailed report by Mr Tim Foxley MBE. He explains that he understands that his overriding duty is to the court and he has attached his CV explaining his background in being able to provide academic papers, articles that he has published and that he had undertaken a tour in Afghanistan with the Ministry of Defence.

15. I shall go to the conclusion section first because the report is detailed and not the easiest document to follow. He says at paragraph 66 as follows:
- “66. The security situation inside Afghanistan remains very poor and the prognosis bleak, certainly into the next five to ten years. The Taliban are certainly active in both Balkh and Herat provinces but at a lower level than the South and East of the country. There are four main risks to your client: resuming his past activities; moving to a Taliban-dominated area; a chance encounter with the Taliban that revealed his past and a chance incident because of the violent situation in Afghanistan.
67. The biggest risk to your client from the Taliban would be if he returned to his home area and/or resumed the type of activity – in the military or supporting military operations – that originally brought him to the Taliban’s attention. If your client was returned to Herat or Mazar-e Sharif I believe it less likely that he will come to the attention of the Taliban and be specifically targeted by insurgent groups. But it is difficult to be confident: much would depend on what he did, where he did it and what information becomes known about him. There are also risks to your client from indiscriminate violence in addition to the stresses, impact and implications of an unaccompanied return. This will be exacerbated by the dearth of resources (including family and friends) available to help him find accommodation, employment and security, as well as mental, emotional and other forms of support.”
16. Firstly, on behalf of the Appellant, there is extensive reference to the expert report. There was reference initially to the Appellant’s medical and psychological condition but it transpired that in fact there is nothing more than a Rule 35 report which was within the Appellant’s original bundle at the FtT. It is explained in a detailed skeleton argument on behalf of the Appellant that there are various documents that assist the Appellant’s version of the background facts. By way of example, the Home Office Country Policy and Information Note for Afghanistan “Fear of anti-Government elements (AGEs) Version 2.0 of December 2016”, paragraphs 2.4, 2.53, 4.2, 8 and others are referred to.
17. It is also said that when looking at the country guidance case of AS at paragraph 72 it would make clear as follows:
- “It is therefore considered necessary to also take action against a person of low level interest when the opportunity arises rather than named individuals because of the Taliban’s need to show that they are serious about sentencing people, enforcing their Regulations and because it helps to scare people leading to the collapse of the government. In these cases, who is killed is less important than the numbers killed, with any assassinations still making the headlines.”
18. In discussing the case with the Appellant’s Counsel, it was difficult to decipher how it was that it could properly be said that a case based on indiscriminate violence could be made out but if I understood the submissions correctly, that was not being pursued. In any event I make clear that I am not satisfied that this is a case in which the

Appellant could possibly succeed to show that there is such a level or risk of indiscriminate violence that a case under Article 15(c) could be made out. Similarly, it cannot properly be said that the case can succeed under the Immigration Rules or indeed on any other basis. This case is very much a fact-specific assessment of an asylum claim.

19. On behalf of the Secretary of State, apart from the submission that the case of AS means First-tier Tribunal Judge Birrell's decision in respect of the risk on right to Kabul has to be set aside, I heard other detailed submissions as well. I was taken to various paragraphs of the country guidance, AS for example, 174, 198, 201, 219, 223, 228 and others. In short, it was clear, it was submitted, that the Appellant would not be at risk. He was not on a list of those being targeted. In any event, ultimately this was an Appellant who was a low-level target in his home area but in any event, as was made clear in paragraph 182 of the country guidance, the Taliban simply do not have the resources to be able to search for, to find or even to know that the Appellant is in their midst. It was also relevant that there was no medical evidence to show that the Appellant would not be able to fit into Afghanistan and there was nothing to say he could not seek employment.
20. It was submitted that the expert report from Mr Foxley added little to the Appellant's case in light of the country guidance case but in any event, when one looks to for example paragraphs 32, 33, 37, 48, 50 and 51 these things of themselves indicated that there was no risk of specific targeting of the Appellant and that in any event one can find unskilled employment and the Appellant would need money but there is nothing to suggest he would not be able to get a financial package of some sort.
21. It was also said that there was very little likelihood of the Appellant being picked up at the airport. It was submitted that the biggest risk to the Appellant was his home area and/or if he is to resume activities according to the expert but there was no risk of the Appellant resuming his activities. It was not established that there was a risk of indiscriminate violence. In summary, the Appellant had been targeted, he was there for the reasons that he was, he was of low profile, he could relocate away from Kabul and that the Taliban would not become aware of his history and it would not be unreasonable for the Appellant to relocate within Afghanistan, and I was invited to dismiss the appeal even on the lower standard of proof.
22. I then heard from the Appellant's Counsel in reply. I turn to the country guidance in AS and the very experienced panel in that case said firstly under the subheading of General Findings of risk at paragraph 173 as follows:

"We consider first the risk of persecution by the Taliban in Kabul to a person who is accepted to be at risk on return from them in their home area. The two main ways in which it is said that this may arise is first, through specific targeting of an individual in Kabul, and secondly, through a chance encounter with a person, for example at a temporary checkpoint in or around the city. We deal with each in turn."

23. The Appellant's Counsel's point in this regard is that the subsequent paragraphs, i.e. paragraphs 174 onwards, which are relied upon by Ms Aboni, deal with risk in Kabul, not in the rest of Afghanistan, so where, by way of example, it is said at paragraph 174 that "the risk of a specific individual being successfully targeted depends upon their identification as a target and the ability to locate them" is talking about them being the subject of this target in Kabul. I agree with that submission. It is clear from paragraph 173 that indeed that the Upper Tribunal were making very clear that they were considering the risk of persecution by the Taliban in Kabul.
24. I note also that it was made very clear that the rest of the country guidance case does refer to aspects such as the end of paragraph 201, which says that there is no real risk that a low-level individual would be successfully targeted by the Taliban in Kabul, and again, this is referring to that particular part of the country. It was also right to say at paragraph 198 that the proper Tribunal said: "Although we have considered the specific situation in Kabul, we also find that it is not significantly worse, if at all, than the security situation prevalent throughout the majority of Afghanistan."
25. Therefore, as a starting point, even for areas outside of Afghanistan I do take into account that the country guidance suggests that although the situation in Afghanistan outside of Kabul is a difficult one it is not significantly worse than the security situation prevalent throughout the majority of Afghanistan. Put another way, it would be a rare case which would succeed in respect of a young, fit male being returned to either Kabul or outside of Kabul. So, in my judgment, it is necessary (and this is what I was trying to get from the Appellant's Counsel), to get specific details why it can be properly submitted and argued that this Appellant would be at risk on return.
26. Now, turning back to the expert report, at the conclusion section, there are other aspects to it. It is said, by way of example, as follows. At paragraph 32 the expert says as follows:
- "Neither the Taliban nor Islamic State physically control and hold ground inside the cities [here he is referring to Kabul, Herat and Mazar-e Sharif in the Balkh province in the North. These are the proposed places of relocation suggested in the reasons for refusal letter]. They are not able to move freely in armed groups within the city, nor are they generally able to operate checkpoints or question and detain people. But they possess networks of spies and informers within city limits, including inside the Afghan government and military institutions. Small, well-trained and highly motivated groups of fighters are regularly able to penetrate security cordons around Kabul and launch attacks against political and military targets as well as indiscriminate attacks against the population. In Mazar-e Sharif and Herat, significant terrorist attacks and insurgent activity do take place but they are much fewer and the Taliban's presence is less extensive."
27. Paragraph 34 refers to the Taliban operating in Herat province but not at the same level of intensity that they do in the South and East of the country. There is reference to Herat province with an April 2018 report of eleven Afghan government soldiers having been killed in one attack and the source for that news is set out. Insofar as

northern Afghanistan is concerned that was at paragraph 39 not to be a natural heartland of the Afghan Taliban but they have been and remain active there. Insofar as Mazar-e Sharif is concerned, that is not held by the Taliban but the Taliban are active in the North. It was also said: "Since last summer the Taliban have been rapidly gaining control of Balkh province, which until then had been one of the safest regions in the country."

28. So, insofar as specific targeting by the Taliban of Herat and Mazar-e Sharif is concerned the expert says at paragraph 45 that moving to any unfamiliar part of the country would be difficult and expose the Appellant to a spectrum of risks and challenges including finding employment. Local, ethnic, tribal, economic and security issues in a new area might provide significant challenges and there would be difficulties accessing reliable information in some parts of the country and a major factor would be the ongoing conflict. Additional risks would be created by the route which the Appellant would be expected to take including travel between locations because of insurgent road blocks and conflict. Moving to any part of the country required money, resources and, crucially, it is said, information and Afghanistan was still in the middle of a major internal conflict with significant levels of violence.
29. It is said at paragraphs 48 onwards when considering the risk from the Taliban in Herat and Balkh provinces that the Taliban operate across large parts of the country and that they are regularly able to move and operate in the open in provinces and districts where they dominate and that although neither the Taliban nor Islamic State physically control and hold ground inside the cities they are not able to move freely in armed groups within the city but the issue would be because the Appellant had been known as someone who had already served in the army that he had been approached before. This aspect of the expert report is corrected by Appellant's Counsel to say that the Appellant had not worked in the army, he had been helping and working for those that are seen as opposition by the Taliban because he was at Camp Bastion.
30. Paragraph 49 explained that the insurgents have the capability to trace people if there was a need but they generally spare their resources for attacking military and political targets and locating and assassinating key and senior political and military personnel within the Afghan government and the international community, making use of intelligence, informers, sympathisers and other information flows.
31. At paragraph 53 the expert made clear that the Appellant would certainly be at greater risk than an average Afghan citizen. He would be of interest to the Taliban in two ways. He would be worthy of punishment including death because of his perceived collaboration with those that the Taliban oppose to and his refusal to join them and, secondly, attacking the Appellant would be an effective means of intimidating the local populace and ensuring compliance even thereafter. Further, he could be useful to the Taliban to bring background military information about the ANA and the international military forces that he has worked with in the past and the bases he has accessed.



32. At paragraph 54 the expert makes very clear: “I do not believe your client would be protected by the security forces in Afghanistan if he feared the adverse attention of the Taliban.” The expert explains that the police and other security forces in Afghanistan have many problems including corruption, drug trafficking, drug use, human rights violations and links to the Taliban, and he said this was widespread and that morale and performance was low. Funding and other resources were limited, inefficiently applied or stolen. This is sourced via reference to The Daily Telegraph. It is said also that the abuses attributed to the local Afghan police still caused grave concern, particularly the Afghan government seemed determined to expand the force, and again, this is sourced via The New York Times.
33. As I have already indicated, ultimately the conclusion from the expert is that there are significant risks to the Appellant if he was to return to Kabul, Herat or Mazar-e Sharif because he would come to the attention of the Taliban and would be specifically targeted by insurgent groups.
34. That is to be contrasted with the country guidance in AS, which I have partially referred to, and it is right to observe that it was made very clear in the country guidance case, it was in the body of the decision but also in the head note as follows:
- “(i) A person who is of lower level interest for the Taliban (i.e. not a senior government or security services official, or a spy) is not at real risk of persecution from the Taliban in Kabul.
- Internal relocation to Kabul
- (ii) Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout [I think that should say many] other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul.
- (iii) However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person’s age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above.
- ...”
35. In my judgment, it is important to look at the specific facts of this Appellant’s case and I remind myself of what Judge Birrell said at paragraph 50 of her decision. It was accepted that two to three months after the Appellant had stopped working at Camp Bastion he was kidnapped and detained by the Taliban. The judge had accepted that the nature of the Appellant’s work exposed him to a risk and that had made his account plausible. It is relevant that the Appellant had explained that he had escaped and that he had received an injury as a consequence.

36. In the Rule 35 report at page 7 of the Appellant's bundle before the FtT it is noted that the Appellant had referred to his torture in more specific terms. The Appellant was punched in the face, kicked and beaten, his nose was fractured, his left arm was left deformed and he could not turn it and it was noted that there was also mention of being emotionally disturbed and getting nightmares and there was an X-ray done of the Appellant's left arm which suggested that the deformity was indeed perhaps from a previous fracture. The Home Office Decision Team had accepted that there was independent evidence of torture in the Appellant's case.
37. In my judgment, set against a background such as that, where some two to three months after the Appellant had left Camp Bastion he was identified, tortured in that quite vicious way accepted by the Secretary of State and indeed accepted in the Rule 35 report and referred to in the Secretary of State's letter at page 7 of the bundle along with the Tajiki ethnicity of the Appellant and his connection to Kabul are all matters which have to be taken into account when assessing the reasonableness of internal relocation.
38. In my judgment, although the country guidance case is very clearly and fully set out within the decision of the panel the specific facts of this case are such that, in my judgment, internal relocation is not a viable alternative. I conclude that it would be unreasonable or unduly harsh when taking into account the two decisions of the House of Lords and also, when taking into account the factual matrix of this particular Appellant's case. With great respect to Appellant's Counsel in relation to the other background material and earlier Home Office internal notes, I give those very little weight because, in my judgment, it is more appropriate to look at the most up-to-date documents provided in the country guidance reports rather than the 2016 documents. Of course, I well appreciate that country guidance has to be followed unless there is extremely good reason not to do so. In my judgment, in this particular case, there is extremely good reason not to do so. That is firstly because the Upper Tribunal itself indicates that each case needs to be considered on the facts. That is because the particular circumstances of an individual applicant must be taken into account. Secondly where the findings in favour of this Appellant by the First-tier Tribunal Judge in this case were so favourable and so serious, in my judgment, the risks are simply too high when considering the lower standard of proof as to whether or not this Appellant may well be the further victim of torture by the Taliban or other insurgents like them.
39. I conclude that I can take into account the expert report of Mr Foxley, albeit it was not an easy report to follow. Ultimately the expert has explained and set out that the Taliban may not be as strong in Herat and in Mazar-e Sharif but that their network of spies and their informal information gathering leads to such disastrous and serious results for the victims that the risk thereby is too high for this Appellant.
40. In my judgment, in undertaking that careful and extensive analysis of all of the evidence and having considered the rival submissions as put forward to me, along with the favourable findings of fact which were previously made, it is appropriate to

conclude that in this case on the specific facts that the country guidance need not be followed.

41. In the circumstances, I conclude that the Appellant has made out his claim for asylum. As I have indicated already, I am not persuaded that this is an appropriate case in which it can be properly be said that there is such a risk of indiscriminate violence that the Appellant would be at risk for the purposes of Article 15(c) or Article 3 or on any other basis.
42. I therefore conclude that I allow the appeal based on asylum.

### **Notice of Decision**

The appeal is allowed on asylum grounds.

### **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 his 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: A Mahmood

Date: 11 July 2018

Deputy Upper Tribunal Judge Mahmood