



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00058/2018

THE IMMIGRATION ACTS

Heard at: Royal Courts of Justice
On 10th September 2018

Decision Promulgated
On 9th October 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Haider [G]
(no anonymity direction made)

Respondent

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms Capel, Counsel instructed by Duncan Lewis & Co

DECISION AND REASONS

1. The Respondent Mr [G] is a national of Afghanistan born on the 1st January 1971. He is a 'foreign criminal' who has been convicted of a number of offences, including a violent and unprovoked knife assault on members of the public. For that reason the Secretary of State seeks to deport him. Mr [G] submits that he cannot be deported to Afghanistan because there is a real risk that he will come to harm should he be returned to that country. In its decision dated the 26th June 2018 the First-tier Tribunal accepted that proposition and

allowed Mr [G]'s appeal. The Secretary of State now has permission to appeal against that decision.

Background and Matters in Issue

2. Mr [G] arrived in the United Kingdom in 1996 and claimed asylum. He was initially granted 'exceptional leave to remain' and in 2002 he was granted indefinite leave to remain as a refugee. He had therefore been living lawfully in the United Kingdom for over 20 years when, on the 11th July 2017, the Secretary of State served him with notice of intention to deport him. The reasons, in broad summary, were that Mr [G] had been convicted, on the 6th June 2017, of two counts of wounding/inflicting grievous bodily harm and two counts of threatening with a blade in a public place. He had been sentenced to a composite total of 27 months imprisonment and ordered to pay a victim surcharge of £170. This was not Mr [G]'s first conviction. In 2001 he had been sentenced to a community punishment order upon conviction of racially aggravated assault and actual bodily harm. The circumstances giving rise to the latest convictions were that on an afternoon in December 2016 Mr [G] had emerged onto the street, drunk and in possession of a knife, from a betting shop. He had come upon a family on their way to mosque and started abusing and threatening them. He told the father and his children that he was going to 'blow them up' and attacked the father and one of the children with the knife. The father was stabbed in the head, his son in the thigh.
3. The legal consequences of these offences, insofar as Mr [G]'s immigration status is concerned were as follows:
 - i) The 27 month sentence triggered the 'automatic deportation' provisions in the United Kingdom Borders Act 2007. Under s32 of that Act the Secretary of State must take action to deport any 'foreign criminal' sentenced to at least two years in prison.
 - ii) Such an individual can only resist automatic deportation where he or she can establish that one or more of the 'exceptions' set out at section 33(2) of the Border Act 2007 applies. As I note above, it was Mr [G]'s case that he could not be deported because this would place the United Kingdom in breach of its obligations under both Article 3 of the ECHR and the Refugee Convention.
 - iii) As a precursor to taking deportation action, therefore, the Secretary of State had first to consider whether Mr [G] still had protection needs. This he did. The Secretary of State concluded that there had been a durable change in Afghanistan such that Mr [G] could now be safely returned there. I hereinafter refer to this decision as the 'cessation decision'. As a matter of law, that related only to Mr [G]'s status as a recognised refugee.
 - iv) The Secretary of State further invoked Article 33(2) of the Refugee Convention to submit that even if Mr [G] is still a refugee he is no

longer entitled to the protection of the Convention, because Mr [G] is a 'serious criminal' as defined at s72 of the Nationality, Immigration and Asylum Act 2002.

- v) That section introduces a rebuttable presumption that Mr [G] has been convicted of a particularly serious crime and that he constitutes a danger to the community in the United Kingdom. It is for Mr [G] to rebut that presumption.
 - vi) Should Mr [G] fail to rebut the presumption that he is a 'serious criminal' he cannot rely on his status as a *refugee* to protect him from removal. Nor can he claim humanitarian protection.
 - vii) In those circumstances Mr [G]'s only remaining option would be to establish that he faced a real risk of inhuman and degrading treatment/ serious harm upon return to Afghanistan, such that would place the United Kingdom in breach of its obligations under Article 3 ECHR.
4. In its deliberations on these issues the First-tier Tribunal found as follows. It accepted that Mr [G] is a serious criminal and that he remains a danger to the community. As such he is excluded from protection by Article 33(2) of the Refugee Convention. The Tribunal further accepted the Secretary of State's argument that the circumstances in connection with which Mr [G] was granted refugee status in 2002 no longer exist: those were that he was seeking to avoid enforced conscription into a Shi'a militia operating in Kabul at the height of the war in Afghanistan. The Tribunal was not, however, prepared to accept that there were no longer any protection needs. Having regard to an expert report prepared by Dr Antonio Giustozzi, the Secretary of State's 'Country Policy and Information Notes' (April 2018 and August 2017) and the advice obtained from UNHCR in respect of the cessation decision, the Tribunal found itself satisfied that Mr [G] remained at risk of serious harm on the grounds that he is a Hazara Shi'a from Kabul, *inter alia* from Anti-Government Elements including Islamic State. The appeal was therefore allowed on protection grounds. The consequence of that decision, if undisturbed, is that the Appellant will have to be granted Discretionary Leave on the grounds that his removal from the United Kingdom would violate the United Kingdom's obligations under Article 3 ECHR.

The Secretary of State's Appeal

5. The grounds are not, with respect, easy to follow, but before me the Secretary of State's case was very helpfully distilled by Mr Melvin. The Secretary of State's central complaint is that the First-tier Tribunal materially erred in departing from the 'country guidance' without good reason. In AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) the Upper Tribunal held that Kabul is generally safe and the First-tier Tribunal in the instant case failed to give adequate reasons why it reached the opposite conclusion. Since the evidence relied upon was all evidence considered in AS, it is the Secretary of State's case

that the First-tier Tribunal's conclusion was not one rationally open to it. Applying the country guidance, the only rational conclusion was that Mr [G] could now return to Kabul in safety. That being the case, the Secretary of State submits that the Tribunal erred in allowing the appeal with reference to Article 3.

6. Mr Melvin pointed out that the country guidance is recent and authoritative. He submitted that none of the materials relied upon by the Tribunal to justify departure from it were in fact of any probative value. The UNHCR guidelines were specifically considered in AS, as were the CPIN reports. Dr Giustozzi does not deal with the position of Hazaras in his report. In essence, Mr Melvin submits, the Tribunal cherry-picked the evidence.

Discussion and Findings

7. Ms Capel's first submission, in response, was that the case of AS (Afghanistan) was not in fact on point. That was a case considering the internal flight options for Afghans fleeing to the capital from other areas of Afghanistan. As such the focus for the Tribunal's enquiry was whether conditions could be said, in general, to be 'unduly harsh'. The Tribunal had, she conceded, made findings about the general safety of the city in that context. At paragraphs 173 to 185 the Tribunal considered the risk to an individual previously targeted by the Taliban in their home area. At paragraph 186 it discounted the risk of forced recruitment by armed groups, and at 187 rejected the argument that returnees might be targeted because they appeared 'Westernised'. From paragraphs 190 to 203 the Tribunal considers the security situation generally. As Mr Melvin says, those findings were that there is not, in general terms, a real risk to civilians in Kabul. Ms Capel points out however, that the Tribunal expressly reserved the position in respect of Shi'a Muslims. At its paragraph 95 the Tribunal said this:

"There was some, albeit limited, evidence before us of wider risks to individuals in Afghanistan but we do not set out the detail of such potential categories other than to mention, for example by reference to the EASO Country of Origin Information Report "Afghanistan - Individuals targeted by armed actors in the conflict" (December 2017), *that there is some evidence of risk to individuals involved in education, healthcare, journalism, the security forces, government workers and to Shia Muslims*".

(emphasis added). The country guidance does not address the position of Hazaras at all, save to acknowledge a document in the evidence, a report by Human Rights Watch entitled "*Afghanistan's Shia Hazara Suffer Latest Atrocity - Insurgents' Increasing Threat to Embattled Minority*". I agree that to this extent the Secretary of State is mistaken in his assertion that AS (Afghanistan) was a 'complete answer' to the protection question in this case.

8. Mr Melvin further submitted that the Tribunal erred in placing the weight that it did on the evidence from UNHCR. The grounds rely on the commentary of the Tribunal in LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076 to the effect that the protection agenda of the UNHCR is not on all fours with the risk assessment being made by the Tribunal in asylum cases; Mr Melvin placed reliance on paragraph 203 of AS (Afghanistan) and asserted that it was clear from this that the views of the UNHCR “had not been accepted” by the UT in that case.
9. There can be no quarrel with the proposition in LP that the remit of the UNHCR is far broader than the parameters of the Refugee Convention or the Qualification Directive. It was not however the case here that the First-tier Tribunal placed any weight on general assertions made by UNHCR about the humanitarian situation in Kabul or the desirability of returning those seeking protection. What the Tribunal had before it was a specific response drafted by the UNHCR in response to the suggestion that the Appellant’s refugee status be cancelled. It was therefore entirely relevant to the Tribunal’s enquiry. As to the assertion that the views of UNHCR were “not accepted” in AS, this is difficult to square with the paragraph cited in the grounds [203]:
203. The UNHCR report was very topical and up to date. We agree with the general submission made by Ms Richards that the protection agenda of the UNHCR is a wider one than the mere assessment of refugee or subsidiary protection status. However, these reports are prepared by persons with direct experience of the core issues involved and thus we accord them substantive weight in this case.
10. The Secretary of State’s second objection to the Tribunal’s reasoning turned on its interpretation of Dr Guistoizzi’s evidence. Mr Melvin questioned how the Tribunal could have placed so much reliance on a report that didn’t even address the position of Hazaras; he further submitted that since Dr Guistoizzi’s evidence had underpinned the findings of the Upper Tribunal in AS that there was no general risk in Kabul, it could not logically be relied upon by the First-tier Tribunal to show that there was.
11. The First-tier Tribunal begins its assessment of Dr Guistoizzi’s evidence at paragraph 23 of the determination, where it notes his view that the Hazara community no longer face the discrimination that it once did in Afghanistan. It goes on at paragraph 24 to focus on a new risk identified by Dr Guistoizzi, that being the systematic targeting of Shi’a Muslims in Kabul by the self-styled ‘Islamic State in Khorasan’ (IS-K). Dr Guistoizzi sets out, and the determination replicates, a list of deadly attacks that took place between July 2016 and April 2018. He writes of a “wave of attacks” in western Kabul, where most of the Hazara population are based, and that the “Islamic State campaign against the Shi’a community shows no sign of abating”. It was *this* evidence, rather than evidence about Hazara per se, that led the Tribunal to its conclusion. The risk was made out, found the Tribunal, because Mr [G] is a Shi’a Muslim, a group that AS specifically recognised to face a higher risk than Sunni Afghans. The

evidence that Dr Guistoizzi gave about IS-K attacks on the Shia community did not feature in AS: I am therefore unable to say that it was irrational for the First-tier Tribunal to take it into account.

12. The overall question that the First-tier Tribunal had to address in this appeal was whether the Secretary of State was able to demonstrate that there had been a durable change in Afghanistan such that the protection needs of Mr [G] had diminished to a point of no legal significance. In answering that question the Tribunal had regard to his specific characteristics, and background evidence *inter alia* from a recognised expert, the UNHCR and the Secretary of State's own 'Country Information and Policy Unit'. For the reasons set out above I cannot be satisfied that in reaching that decision the Tribunal impermissibly deviated from the country guidance, since AS expressly declines to consider the position of Shia Muslims in detail, and makes no mention at all of Hazaras. As the extract from AS (above) demonstrates, the Upper Tribunal has consistently said that the views of the UNHCR are to be afforded substantial weight; similarly Dr Guistoizzi has been repeatedly recognised as a knowledgeable and impartial expert. It cannot therefore be said that it was irrational or otherwise unlawful for the Tribunal to take their evidence into account.

13. I am not satisfied that the grounds as argued before me are made out.

Decision

14. The decision of the First-tier Tribunal is upheld.

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
3rd October 2018