



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

Appeal Number: PA/02249/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 12 September 2019**

**Decision & Reasons Promulgated
On 18 September 2019**

Before

**UPPER TRIBUNAL KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

Between

**B S
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Khan, counsel

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before us for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge Sills promulgated on 5 June 2019.
2. No anonymity direction was made in the First-tier Tribunal but, given the appellant will be removed to Afghanistan as a failed asylum seeker an anonymity order is appropriate.

Background

3. The appellant is an Afghan citizen born on 1 January 1995. He entered the UK in February 2015 and claimed asylum on the same day. He claimed to be at risk of serious harm from the Taliban who had previously kidnapped and detained him for three years; he had escaped, found his family but left Afghanistan a year later when the Taliban had been seen in the area looking for him.
4. The appellant's asylum claim was refused and his appeal against that decision was dismissed on 22 June 2017. It was found that various aspects of his account were inconsistent and that he was not at risk on return or by reason of indiscriminate violence in the context of an internal armed conflict.
5. The appellant made further submissions on 9 January 2019. The basis of those submissions was that the security situation in Afghanistan was such that the appellant would be at risk on return; he would be viewed as a traitor for leaving the country. He did not submit further evidence about the matters on the basis of which his earlier appeal had been dismissed.
6. The fresh submissions were refused but the respondent accepted that the fresh claim test had been met; the appellant was given a right of appeal. The respondent did not accept the appellant was at risk in his home area, Nangarhar. In any event, he could relocate to Kabul. The respondent relied on the country guidance in **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)** and **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118**.
7. Judge Sills dismissed the appellant's appeal against the respondent's decision. The Judge relied on the country guidance insofar as the Article 15(c) risk was concerned. He also dismissed the Article 8 claim.
8. Permission to appeal was granted in the First-tier Tribunal in the following terms:
 - “2. It is alleged that the judge has made an arguable error of law in the interpretation of Article 15(c) in that the judge failed to properly address the objective evidence produced on behalf of the appellant.
 3. It is arguable that in finding that there is no situation of internal armed conflict in Afghanistan (paragraph 14) the judge may have misunderstood the ratio of **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163** which does not say there is no armed conflict. The judge further erred in finding that the appellant was seeking to distinguish or ask him to depart from the country guidance – this is not evident from the reading of the skeleton argument submitted or the oral submissions made by the appellant's representative. Departure from the country guidance is noted in the record of proceedings in submissions by the respondent. The judge has made an arguable error of law in finding that the appellant was seeking it. This shows lack of proper consideration of the appellant's case as put to him.”

Submissions

9. Mr Khan, for the appellant, relied initially in his oral submissions on the grant of permission

to appeal. He had noted the Rule 24 reply lodged by the respondent and indicated he would respond to Ms Isherwood's oral submissions.

10. For the respondent, Ms Isherwood submitted the grounds of appeal disclosed merely a disagreement with Judge Sills' findings. She noted the Judge had identified the history of this appellant at [3] and the basis of his further submissions at [4] namely that he would be at risk on return because of the security situation in Afghanistan. Judge Sills noted the appellant had not submitted further evidence in support of his claim. While the Judge had stated, possibly erroneously, at [14] that there was no situation of internal armed conflict anywhere in Afghanistan, he had also found that relocation to Kabul was not unreasonable, a finding which he reasoned later in the decision. Ms Isherwood took us through the decision with some care. She submitted that Judge Sills had taken into account all the background material to which the appellant's counsel had referred. This included the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan published on 30 August 2018 ("the UNHCR guidelines"). She submitted it had been open to Judge to follow the country guidance.
11. Mr Khan acknowledged that **AS (Safety of Kabul)** remained good law (albeit the case had been remitted to the Upper Tribunal). The grant of permission focussed on **AK (Article 15(c))**. He submitted that the UNHCR material before Judge Sills post-dated the judgment in **AS (Safety of Kabul)** which had been decided in late 2017. The changed situation was described in that report: conditions in Afghanistan were significantly and materially different. Judge Sills' finding that there was no situation of internal armed conflict in Afghanistan was wrong. **AK (Article 15(c))** remained good law, at least until **AS (Safety of Kabul)** was fully considered. He submitted Judge Sills had to make a decision as to the extent to which the situation had materially changed. The appellant was not a person of rank or position; he was a civilian. It was for Judge Sills to decide whether, as such, he was at risk of serious harm. He had relevant material before him, namely the UNHCR guidelines. Mr Khan identified the pertinent passages at Section B of that report. The UNHCR had identified that civilians were bearing the brunt of the conflict and that the number of civilian casualties had increased between 2009 and 2017, with a disturbing increase in casualties in the first half of 2018. Thus this report demonstrated a significantly increased internal armed conflict such that in 2018 it was severe. He submitted that this was material background evidence which had not been properly taken into account, such that there was a material error of law.

Discussion

12. It is clear from the appellant's skeleton argument produced for Judge Sills, the main plank of the appellant's appeal was his claim that his removal would place the UK in breach of Article 15(c). Reliance was placed in that skeleton on the background material cited in the respondent's reasons for refusal letter, including the UNHCR guidelines. The skeleton does not include a specific submission that the Judge should depart from the country guidance; it relies on the background material to assert that the appellant would be at risk of indiscriminate harm on return.
13. The record of proceedings indicates that the Home Office Presenting Officer adopted the reasons for refusal, submitted that the UNHCR guidelines did not indicate that all were at risk; and that it was for the appellant to demonstrate he had a profile such that he would be at

risk. It was submitted to Judge Sills that his brother, who was now British, had returned to Afghanistan to find their family and that the appellant had no particular vulnerabilities. The Presenting Officer submitted that Judge Sills could follow the country guidance in **AK (Article 15(c))** and **AS (Safety of Kabul)**.

14. Submissions to Judge Sills for the appellant were made on the ground that Article 15(c), Articles 2 and 3 of the European Convention on Human Rights, but not the Refugee Convention, were engaged by the decision. It was submitted that the appellant was at risk due to his absence from Afghanistan, his unfamiliarity with attacks, and the need to flee. Reference was made to the UNHCR guidelines. Neither the appellant's skeleton argument nor the record of proceedings make reference to a specific submission for the appellant that the Judge should depart from the country guidance.
15. Nonetheless the Judge started his decision-making by finding that the country guidance was clear (albeit he misrepresented it by stating there was no situation of internal armed conflict anywhere in Afghanistan, see below). He went on to find that "internal relocation to Kabul will not in general be unreasonable". He concluded that, in the light of the country guidance, the appellant was "asking [him] to depart from this country guidance". While there does not appear (and the record of proceedings is inevitably not a verbatim record of oral submissions) to have been a specific submission to that effect, it was not unreasonable for the Judge to infer this from the appellant's reliance on the background material, as opposed to the country guidance.
16. There is no challenge before us as to the circumstances in which a Judge may choose to depart from country guidance (as set out at [15] – [17] of the Judge's decision). Nor is it in dispute before us that the relevant country guidance is **AK (Article 15(c))** and **AS (Safety of Kabul)**.
17. We note that the Court of Appeal has, in **AS (Afghanistan) v SSHD [2019] EWCA Civ 873** found that the Upper Tribunal erred in law in that its conclusion as to the percentage risk of being a victim of indiscriminate violence was not available to it on the evidence. The case was remitted to this Tribunal on the basis that it need consider only the extent of the risk to returned asylum seekers from security incidents. It was for the tribunal to consider, in the light of the UNHCR guidelines on returns, whether a more extensive basis for reconsideration was required. Nonetheless, as Mr Khan acknowledged before us, **AS (Safety of Kabul)** remains good law. The judgment in **AS (Safety of Kabul)** endorsed **AK (Article 15(c))** where it was found that the proportion of the population directly affected by the security incidents in Kabul was tiny and the current situation did not render internal relocation to Kabul unreasonable or unduly harsh.
18. Judge Sills took into account the appellant's personal circumstances. He noted that the appellant's brother was, at the date of hearing, visiting Afghanistan voluntarily notwithstanding the appellant's claim to be at risk of indiscriminate harm due to the security situation there. The Judge observed that the appellant's brother's British citizenship "would [not] significantly reduce any risk faced". Judge Sills adopted the findings of the previous tribunal as regards the appellant's account of being at risk of harm as a result of his claimed experiences there; these had been rejected and no new evidence had been produced.

19. At [27] the Judge notes that both parties relied on the UNHCR guidelines in their submissions. He noted that these state

“the situation in Afghanistan, depending upon the particular circumstances, may give rise to a risk of harm under 15(c) (AB117). The guidelines do not state that there is such a risk, just that there may be one. ... the Guidelines do not give a clear breakdown of the security situation by region. At AB32 the Guidelines state that 2017 saw a 9% decrease in violence and there were 10,453 casualties (3438 deaths and 7015 injured). The first half of 2018 had seen 1692 deaths and 3430 injured. The number of deaths recorded in the first half of 2018 is the highest recorded, though a comparison of the overall number of casualties is not given. The Appellant has not provided detailed evidence of how the situation has developed since August 2018”.

20. The Judge also noted that the Guidelines were published in August 2018 and that the court in **AS (Safety of Kabul)** considered evidence up to December 2017. He considered it relevant that the UNHCR Guidelines were only about 6 months more up to date than the most recent country guidance. He found

“AS found that internal relocation to Kabul was in general reasonable despite the fact that the city had suffered the highest number of civilian casualties.”

He also noted

“While the number of deaths increased in the first half of 6 months [sic], the UNHCR guidelines does [sic] not make clear if there was an overall increase. ... Nor does [sic] the UNHCR Guidelines give a clear assessment of the level of violence in different provinces, and in Nangahar and Kabul in particular. Further, the UNHCR Guidelines only state that the situation in Afghanistan may give rise to a 15(c) risk.”

21. Having carefully reviewed the content of the UNHCR guidelines, the Judge refers to having considered the other country reports adduced by the appellant. He goes on to find at [30] that the appellant does not have “any particular vulnerabilities”; he is “not in poor health” and “his brother would be in a position to provide him with some material support from the UK on return to Afghanistan”. He has thus made specific findings about the appellant’s personal circumstances on return; there is no challenge to these.
22. Judge Sills concludes at [31] that there are not very strong grounds supported by cogent evidence for departing from the country guidance. He points out that he has identified “limitations to the UNHCR Guidance”. He concludes, relying on the country guidance, that the appellant can return to his home area (Nangarhar) or relocate to Kabul.
23. We agree that Judge Sills made an error of law in stating at [14] “there is no situation of internal armed conflict anywhere in Afghanistan”. This is plainly wrong and contrary to the country guidance. He misdirected himself and this is an error of law. We consider its materiality below.
24. We note the terms of the grant of permission to appeal but consider that it was not unreasonable for Judge Sills to infer that he was being asked to depart from the country

guidance in the light of the background material (including the UNHCR Guidelines) adduced for the appellant. Even if that were not the case, the Judge made sustainable and cogent findings about the merits of that material and it was open to him to follow the country guidance.

25. As regards the remaining grounds of appeal and Mr Khan's oral submissions, we are unable to accept them. Judge Sills carefully considered the UNHCR Guidelines and, on reasonable grounds, did not find that the material warranted sufficient weight to depart from the country guidance. He has explained why that is. He took into account the appellant's personal circumstances as a civilian. We are satisfied that the grounds and submissions constitute no more than disagreement with the findings of Judge Sills. While Judge Sills made an error of law in stating that there was no internal armed conflict anywhere in Afghanistan, that finding must be seen in the context of Judge Sills' decision as a whole. It is clear from his findings, taken as a whole, that he had regard to all the material before him. Those findings are well reasoned and sustainable on the evidence and background material notwithstanding the latter post-dates the country guidance.

Decision

26. The making of the decision of the First-tier Tribunal did not involve a material error of law and the decision is preserved.
27. This appeal is dismissed.

Signed A M Black
Deputy Upper Tribunal Judge A M Black

Date 13 September 2019

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 A M Black
Deputy Upper Tribunal Judge A M Black

Date 13 September 2019