



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

Appeal Number: PA/02784/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2019**

**Decision & Reasons
Promulgated
On 19 November 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**S H (AFGHANISTAN)
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Edward Nicholson, Counsel instructed by Ata & Co Solicitors

For the Respondent: Mr Chris Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an anonymity order. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties.

Any failure to comply with this order could give rise to contempt of court proceedings.

1. The appellant appeals with permission against the decision of the First-tier Judge in Birmingham dismissing his appeal against the respondent's refusal of international protection and or leave to remain on human rights grounds. The appellant is a citizen of Afghanistan.
2. Permission to appeal was granted by First-tier Judge Neville on the basis that the First-tier Judge decided the appeal on the basis of internal relocation to Kabul alone, but failed to make a finding as to whether there was a real risk in the home area, without which the question of internal relocation does not arise, and that his findings of fact and credibility, in particular his treatment of expert evidence before him, were arguably erroneous.
3. In granting permission, Judge Neville noted that the First-tier Tribunal erred in law in relying on the Upper Tribunal decision in *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 18 (IAC) which was overturned by the Court of Appeal in *AS (Afghanistan) v Secretary of State for the Home Office Department* [2019] EWCA Civ 873 and remitted for reconsideration. The Court of Appeal's reasons for remitting focused on the actual percentage number of casualties.
4. At [80]-[82], Lord Justice Underhill defined the task for the Upper Tribunal on remittal in *AS*:

"80. In those circumstances it seems to me that the remittal to the Upper Tribunal can and should be on the basis that it need reconsider its conclusions only on the question of the extent of the risk to returned asylum-seekers from security incidents of the kind considered at paras. 190-9 of its Reasons. Although of course the relevance of that risk is to the overall issue of whether it is reasonable for asylum-seekers to be expected to relocate to Kabul, it is in practice a self-contained element within that assessment, and since I would hold that there was no error of law in the Tribunal's approach to the other elements I see no reason why those elements require to be reconsidered.

81. The fact that the remitted issue is self-contained means that there would be no difficulty in it being heard by a differently-constituted Tribunal; and I think that in the circumstances of the present case, given the nature of the error on ground 1, that would be the correct course. A fresh Tribunal would of course not be privy to the evidence called on the previous occasion, or the submissions made; and that would mean that the evidence as to security risk adduced at the previous hearing would have to be adduced again (unless agreed), together with any updating evidence that might now be available, and further submissions made. But the scope of the remitted hearing would still be far more limited than first time round.

82. Those limits on the scope of the remittal are subject to one important qualification. *We were told that last year, after the decision of the Upper*

Tribunal, UNHCR produced further Guidelines on returns to Afghanistan, which, unlike the 2016 version, unequivocally recommend that "given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city". It will be for the Tribunal, no doubt after hearing submissions, to consider whether that assessment requires a reconsideration of its country guidance on a more extensive basis than is required by the remittal of this appeal. If it decides that it does, it is likely to make sense either for the scope of hearing to be increased or (which may be procedurally more correct) for the remittal in this case to be heard along with whatever appeal is the vehicle for that wider consideration."

[Emphasis added]

5. Permission to appeal was also granted in this appeal in relation to the Judge's reliance on *EU (Afghanistan) & Others*: the First-tier Judge's decision at [22]-[27] contains a speculative disagreement with the appellant's evidence about his ongoing contact with his mother after 2017, which appears to have been made to the ordinary civil standard (the Judge finds the evidence not 'likely') and/or by reference to what the judge repeatedly refers to as his own "common sense" rather than basing his conclusions on the evidence before him and applying the lower standard of proof used for the assessment of international protection claims.
6. Since I have found that the First-tier Tribunal's findings of fact and credibility were made to the higher standard of balance of probabilities rather than the international protection standard of real risk or reasonable degree of likelihood, only positive findings as to fact or credibility can survive. There are no such findings in this decision.
7. The First-tier Tribunal decision is unsound and cannot stand. There is no alternative but to set aside this decision and remit it to the First-tier Tribunal for remaking, with no findings of fact or credibility preserved.

DECISION

8. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade afresh in the First-tier Tribunal on a date to be fixed.

Signed **Judith AJC Gleeson**
November 2019
Upper Tribunal Judge Gleeson

Date: 14