



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

Appeal Number: PA/10293/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20 August 2019**

**Decision & Reasons Promulgated
On 27 August 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

**KR
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms U Miskiel, Counsel, instructed by Aschfords Law

For the Respondent: M D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Connor (the judge), promulgated on 10 June 2019, dismissing the appellant's appeal against the respondent's decision dated 16 August 2018 refusing his protection and human rights claim.
2. The appellant is a national of Afghanistan born in April 1989. He claims to have entered the UK on 6 April 2018 hidden in the back of a lorry. He made an asylum claim based on his alleged fear of the Taliban. I briefly summarise his claim.

3. The Taliban targeted the appellant and his other younger brother because their older brother worked for an NGO (Shelter Now) as a chef in 2006. The Taliban believed the NGO promoted Christian and western values. From 2006 onwards the Taliban have tried to take revenge on the appellant and his younger brother. The younger brother was shot and killed by the Taliban in September 2013. The appellant himself was attacked on several occasions. As a result of two of the attacks the appellant transferred from the University of Baghlan to Takhar University in his third year of study. After completing his studies the appellant still did not feel safe and eventually left Afghanistan in 2017.
4. A psychiatric report (prepared by Dr Persuad) concluded that the appellant suffers from PTSD and depression, and a scarring report (prepared by Dr Lingam) concluded that scars on his body were consistent with his account of the Taliban attacks. Within the same month of his arrival in the UK the appellant was able to locate his father's cousin and get engaged to this person's daughter. They married in July 2018 and were expecting their first child in July 2019. The appellant was also able to contact his older brother soon after his arrival. The older brother claimed he was recognised as a refugee by the Bulgarian authorities and that he entered the UK in 2015 with his Bulgarian wife.
5. The respondent accepted the appellant's claimed nationality and identity but rejected his account of his older brother's employment with Take Shelter and rejected the appellant's account of being targeted and attacked by the Taliban. The respondent noted the applicant's claim to have lived in Baghlan and Takhar and relied on background information indicating that Baghlan was a contested area of Afghanistan, as were parts of Takhar province (paragraph 98). The respondent was however unable to establish that the applicant lived in either area and considered that he could relocate to Kabul. The respondent was not satisfied that the refusal of the applicant's human rights claim would breach Article 8.

The decision of the First-tier Tribunal

6. For reasons that will become apparent it is not necessary for me to consider the judge's decision at length. The judge summarised the appellant's claim and the respondent's position and set out in detail the evidence given at the hearing by the appellant, his wife, her father and the appellant's older brother. Having summarised the representative's submissions and having directed herself on the burden and standard of proof the judge set out her findings from [96] onwards. The judge did not find the appellant or his witnesses to be credible. Whilst the judge took into account the diagnosis of PTSD and depression she found that a number of significant inconsistencies could not be attributed to the appellant's mental state. The judge noted inconsistencies relating to when the appellant contacted his

older brother in the UK and the nature of his relationship with his older brother. The judge did not find it plausible that the appellant would have been able to locate his father's cousin and become engaged to the cousin's daughter within the space of about 2 weeks. The judge drew an adverse inference based on amendments made to various statements that deleted references to the appellant's wife and her father visiting the appellant in Afghanistan. The judge did not find it plausible that the appellant would wait so long before leaving Afghanistan if he had been constantly targeted since 2006.

7. At [100] the judge stated,

"In relation to the injuries the appellant says he sustained when he was attacked by the Taliban, he has produced a report from Dr Lingam. Dr Lingam finds the scars are consistent with the history of abuse described by the appellant but all are non-specific and can be from other causes. I have considered the report of Dr Lingam in accordance with KV (Scarring-medical evidence) Sri Lanka [2014] UKUT 00230 (IAC)."

8. Having given a number of reasons why the judge did not find the appellant's account of events in Afghanistan to be credible, the judge stated, at [119],

"The appellant's credibility is damaged as a result of the above. I have considered as part of the evidence the reports of Dr Persuad and Dr Lingam but in light of the credibility findings I have made in the inconsistencies in evidence I place limited weight on the reports. I do accept the appellant has a mental health condition and I have viewed and considered his evidence in light of that condition."

9. The judge then considered **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118** and concluded that the appellant could internally relocate to Kabul. Although the judge made several references to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan dated 30 August 2018 she did not engage with the submission in the skeleton argument prepared by the appellant's representative that **AS (Afghanistan)** could be distinguished by reference to the UNHCR Guidelines. The judge dismissed the appeal on protection and human rights grounds.

The challenge to the First-tier Tribunal's decision and the 'error of law' hearing

10. Permission was granted to the appellant to appeal to the Upper Tribunal on the basis that it was arguable the judge failed to adequately consider the UNHCR Guidelines, particularly given that the appellants wife's family had been granted refugee status in the UK, and the judge failed to adequately assess the scarring report and improperly followed the Upper Tribunal guidance issued in **KV** when, at the date of the hearing, the Court of Appeal had stated that the guidance in **KV** was of no effect and that, at the time of the

promulgation of the judge's decision, the Supreme Court had not followed the Upper Tribunal's decision (**KV (Sri Lanka) v SSHD** [2019] UKSC 10).

11. At the outset of the 'error of law' hearing Mr Clarke, the Presenting Officer, conceded that the judge's decision contained two material error of law requiring it to be set aside. Mr Clarke accepted that the judge erred in law in failing to engage with the submission made on behalf of the appellant that **AS (Afghanistan)** should now be distinguished in light of the August 2018 UNHCR Guidelines as to the availability of internal relocation to Kabul. Mr Clarke was additionally concerned that the judge may have misdirected herself when assessing the appellant's credibility by placing limited weight on the two expert reports "in light of the credibility findings" she had already made. Mr Clarke described this as a **Mibanga v SSHD** [2005] EWCA Civ 367 type point. He additionally accepted that, although Dr Lingam found that the scars were 'consistent' with the appellant's account (applying the Istanbul Protocol) Dr Lingam nevertheless ruled out alternative causes and that the judge failed to consider this aspect of the scarring report. Both parties agreed that the identified errors of law required the decision to be set aside and that, as they affected the judge's adverse credibility findings it was most appropriate for the matter to be remitted for a fresh hearing.

Discussion

12. For the reasons outlined above I agree with both representatives that the decision is unsustainable. It is readily apparent from this detailed decision that the judge generally paid careful attention to the evidence before her and that she gave a number of cogent reasons for doubting the appellant's account. Paragraph 119 however gives the impression that the judge placed only limited weight on the two expert medical reports because she had already found the appellant to be an incredible witness. This was expressly conceded by Mr Clarke. As a consequence there is a danger that the judge 'pulled the cart before the horses' by finding the appellant was an incredible witness before taking adequate account of both medical reports. There is the additional concern that the judge may have attached less weight to the scarring report because she considered that report by reference to the Upper Tribunal decision in **KV**. Both the Court of Appeal and then the Supreme Court held that the guidance given by the Upper Tribunal should not be followed. Ms Miszkiel accepted that there was a tension within the scarring report as Dr Lingam found, on the one hand, that the 3 scars on the appellant's body were consistent with the history of abuse described by him, necessitating a finding that their clinical features were all non-specific and could be from any accident or injuries, and then, on the other hand, discounting the possibility of a number of possible causes, including accident. The judge failed to refer to all take into account this inherent tension.

13. I also agree with the parties that the judge failed to engage with the submission made by Ms Miszkziel that the Country Guidance decision in **AS (Afghanistan)** could be distinguished following the publication of the latest UNHCR Eligibility Guidance relating to Afghanistan in August 2018. The appellant claimed to have lived in two areas outside Kabul and to have never lived in Kabul. Although the respondent was unable to establish whether the appellant had lived in Baghlan and Takhar she appeared to accept in her Reasons for Refusal Letter that these were both contested areas. Internal relocation to Kabul was therefore a live issue. The judge applied the guidance given in **AS (Afghanistan)** but did not engage with the submission before her that the Country Guidance case could be distinguished. Nor did the judge adequately consider the possibility of internal relocation to Kabul given that the family of the appellant's wife, who originated from Kabul, were recognised refugees.
14. Both representatives agreed that the identified errors of law required the decision to be set aside and remade afresh. Mr Clarke submitted that it should be open to both parties at the remitted hearing to refer to the oral evidence given in open court during the hearing on 5 March 2019. Ms Miszkziel expressed concern with the potential accuracy of the evidence recorded by the judge in paragraphs 8 to 69. I indicated that she would have an opportunity of checking her own notes of the hearing with that recorded by the judge in his decision, and that the respondent would also have an opportunity of considering the accuracy of those paragraphs of the judge's decision. There is in principle no reason why evidence given in open court during a hearing and accurately recorded in a judge's decision should be discounted simply because the judge's decision has been found to be unsafe.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Connor.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.

D.BLUM

20 August 2019

Signed
Upper Tribunal Judge Blum

Date