



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01239/2020

THE IMMIGRATION ACTS

Heard at Field House  
On the 6<sup>th</sup> September 2021

Decision & Reasons Promulgated  
On the 11<sup>th</sup> October 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A

(ANONYMITY ORDER CONFIRMED)

Respondent

**Representation:**

For the Appellant: Mr. T Lindsay, Senior Presenting Officer

For the Respondent: Ms. N. Amin, Counsel, instructed by Sohaib Fatimi Solicitors

DECISION AND REASONS

**Introduction**

1. The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.
2. This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Beg ('the Judge') to allow the claimant's appeal on humanitarian protection and human rights (article 8) grounds.
3. The claimant has not cross-appealed the decision of the Judge to refuse his appeal on asylum and human rights (articles 2 and 3) grounds.

4. Permission to appeal to this Tribunal was granted by Judge of the First-tier Tribunal Parkes by a decision dated 14 May 2021.

### **Anonymity**

5. The Judge issued an anonymity order and neither party has requested that it be set aside. The order is detailed at the conclusion of this decision.

### **Background**

6. The claimant is a national of Afghanistan and is presently aged 28. He hails from Nangarhar Province. He details that he moved to Pakistan with his family in 1995, when aged 2, and remained there for 12 years before returning to Afghanistan in 2007. He asserts that his father was a member of the Taliban and forced his brother to join. His brother was killed in 2008. The claimant subsequently became aware that his father wished for him to join the Taliban. In January 2009 the family home was raided by security forces. Seven of his father's friends and three members of the security forces were killed. The claimant fled with his father and two others. His uncle subsequently arranged for the claimant to leave Afghanistan. He details that he travelled firstly to Iran and then to Turkey. He subsequently travelled to the United Kingdom via Greece, Italy and France, clandestinely arriving in this country on 16 July 2009. He claimed asylum on 31 October 2019, some 10 years after his arrival.
7. The claimant asserts a well-founded fear of persecution of both his father, who he fears will force him to join the Taliban, and the (now former) government of Afghanistan.

### **First-tier Tribunal decision**

8. The appeal came before the Judge sitting remotely at Taylor House on 11 March 2021. The claimant attended and gave evidence.
9. The Judge found the claimant to be incredible as to core aspects of his personal history: §§27, 29-31, 38-40 and 51 of the decision. Reliance was placed upon section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, at §41.
10. The Judge concluded, *inter alia*:
  - '58. I find that the appellant is not of adverse interest to the authorities. However, I bear in mind his lack of a support network, unfamiliarity with the city and country which he left as a child. I find that it will be difficult for him to access effective state protection if he fears for his safety. I find that given the pressures on the security services in Kabul, they are unlikely to show a willingness to protect someone of the appellant's age even if he is living alone in a city he is unfamiliar with, in the sense of navigating his day-to-day life there. The EASO report 4 December 2020 in the bundle confirms that there is a lack of sufficiency of protection both in Kabul and outside.
  59. I find in considering the evidence as a whole, that the appellant's father was not a member of the Taliban, nor was the appellant's home raided by security services. I do not find the arrest warrant and the summons submitted by the appellant to be reliable documents. Whilst the expert report makes it clear that the Taliban have recruited young men to their

ranks, for the reasons that I have given, I do not find the appellant a credible witness. In conclusion, I find that the appellant does not have a well-founded fear of persecution for a Convention reason. For the same reasons, I find that there would not be a breach to the appellant's rights under articles 2 and 3 ECHR.

60. I do however find that the appellant is [at] real risk of suffering serious harm on return to Afghanistan as an individual living alone without a support network in Kabul. He will be unfamiliar with how to access basic services, including housing and healthcare. He has no experience of working in Afghanistan. His age and circumstances, including the fact that he will be viewed as an outside recently returned from living abroad, will likely place him at real risk of suffering serious harm from criminal gangs and non-state agents. Consequently, I find that [the] appellant qualifies for humanitarian protection.

...

62. For the reasons I have already given about the appellant's limited ability to navigate the day to day challenges of living in Kabul, I find that there would be very significant obstacles to his integration into Afghanistan, if he was required to leave the United Kingdom. I find that the appellant meets the requirements of paragraph 276ADE(vi) of the Immigration Rule ...

...

66. The appellant established a private life in the United Kingdom at a time when he had no leave to remain. He did not claim asylum until 2019, having arrived in the United Kingdom in 2009. I bear in mind that he arrived as an unaccompanied minor. He gave evidence that he has not done very much since his arrival in the United Kingdom. He has limited education, few skills and no employment experience.

67. For all the reasons which I have already given, I find that resettling in any part of Afghanistan will be difficult for the appellant, in terms of accessing basic services and operating safely on a day to day basis. In conclusion, I find that any interferences in the appellant's article 8 rights will be disproportionate. The interference will result in unjustifiably harsh consequences.'

11. The Judge implicitly accepted the claimant's age and so accepted that he left Afghanistan in 2009 when aged 16. It was accepted that the claimant resided in Pakistan from the ages of 2 to 14.

### **Grounds of appeal**

12. The Secretary of State challenges the decision to allow the appeal on humanitarian protection grounds on the basis that the claimant would be returning to Kabul as a lone adult with few skills to support himself. Reliance is placed upon the country guidance decision in *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 118 as establishing that the level of indiscriminate violence in Kabul is not sufficient to meet the threshold of article 15(c) of the Qualification Directive. I observe the country guidance decision in *AS (Safety of Kabul) Afghanistan CG* [2020] UKUT 130 (IAC).

13. Complaint is also made that the Judge failed to give adequate reasons for finding that the claimant would not secure support from his family upon return to Afghanistan.
14. It is further stated that in finding that very significant obstacles would arise as to prevent reintegration into life in Afghanistan, the Judge's errors as to her humanitarian protection considerations infected her article 8 decision.
15. In granting permission to appeal, Judge Parkes reasoned, *inter alia*:
  - '3. The Judge did refer to AS but it is arguable that with the findings made the suggestion that he would be without adequate support and that he would not be able to make his way in Kabul was not adequately reasoned. It is arguable that the Judge contradicted [herself] and made findings that were not open on the accepted evidence applying the country guidance.'

## Decision

### *Humanitarian Protection*

16. I observe that subsidiary protection - identified domestically as humanitarian protection - is established by article 18 of Council Directive 2004/83/EC ('the Qualification Directive') and has been transposed into domestic law by paragraph 339C of the Immigration Rules ('the Rules'):
 

**339C.** A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

  - (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom
  - (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
  - (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
  - (iv) they are not excluded from a grant of humanitarian protection.
17. The concept of subsidiary protection was defined by the Austrian Presidency of the European Union in 1998 as protection for persons from third states who do not fall within the scope of the 1951 UN Convention on the Status of Refugees but who still have need of some other form of international protection. It is distinguished from temporary protection on the basis that it is granted following individual status determination, whereas in the European Union context temporary protection denotes protection granted in a mass influx situation.
18. Third country nationals are required to establish 'substantial grounds' for believing that they would face a 'real risk' of suffering 'serious harm' if returned to their country of origin.
19. Humanitarian protection cannot be granted for any kind of harm, discrimination or breach of rights which an individual may suffer. Domestically, it can only be granted

upon establishing one or more of the three criteria identified as constituting ‘serious harm’ identified by article 15 of the Qualification Directive, which has been transposed domestically by paragraph 339CA of the Rules, in addition to the domestic confirmation that serious harm also consists of ‘unlawful killing’:

**339CA.** For the purposes of paragraph 339C, serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

20. The Judge provided her reasons for allowing the claimant’s appeal on humanitarian protection grounds at §60 of her decision, detailed above. Unfortunately, the decision does not clarify the substantive nature of the serious harm established by reference to paragraph 339CA of the Rules. I observe that paragraph 339CA(i) and (ii) are not applicable on the facts arising in this matter. I am therefore required to consider if it is possible to identify whether the appeal was allowed through the application of paragraph 339CA(iii) or (iv).
21. Paragraph 339CA(iii) transposes article 15(b) of the Qualification Directive which in turn provides that persons at real risk of a breach of their protected rights under article 3 ECHR (‘prohibition upon torture, inhuman or degrading treatment) and who are unable to establish international protection under the Refugee Convention can secure humanitarian protection. As the Judge expressly determined at §59 of her determination the claimant could not establish his article 3 ECHR claim to the required standard and it follows that the humanitarian protection appeal could not properly have been allowed on this limb of the ‘serious harm’ assessment.
22. The Secretary of State proceeds in her appeal on the basis that the Judge concluded that serious harm was established in accordance with paragraph 339CA(iv) of the Rules, which transposes article 15(c) of the Qualification Directive.
23. An assessment of protection needs under article 15(c) only takes place if an applicant is unable to establish a need for refugee protection or subsidiary protection under article 15(a), article 15(b) and on unlawful killing grounds: paragraph 339CA(i), (ii) and (iii).
24. Article 15(c) draws not on prescribed standards, except insofar as it has regard to the right to life enshrined in article 2 ECHR, but on state practice, a source explicitly contemplated in paragraph 25 of the preamble to the Qualification Directive. When considering an application for subsidiary protection, the competent authorities of the Member States must examine all the relevant circumstances which characterise the situation of the country of origin of the applicant in order to determine the intensity of an armed conflict: Case C-901/19 *CF and DN v. Germany* ECLI:EU:C:2021:472 (10 June 2021).

25. A claim for protection based on indiscriminate violence must be assessed by applying the test set out in *QD and HA (Iraq) v. Secretary of State for the Home Department* [2009] EWCA Civ 620; [2011] 1 W.L.R. 689, at [40]:
- ‘40. ... Is there in [country] or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant would, solely by being present there, face a real risk which threatens their life or person? ...’
26. The reference to ‘a material part’ in the test is a reference to an applicant’s home area or, if appropriate, any potential place of internal relocation, where the fear of serious harm is clearly limited to specific parts of the country. Consideration is therefore to be given to paragraph 339O of the Rules which is concerned with internal relocation.
27. Article 15(c) is only engaged where an individual can show there is a real risk of serious harm on account of indiscriminate violence. The risk of harm is not only concerned with a threat to life but also the physical or mental integrity of those caught up in violence.
28. The first requirement for benefitting from protection under article 15(c) is that the applicant is a civilian and is a genuine non-combatant: *QD and AH (Iraq)*, at [37]. Further, the existence of an armed conflict is a necessary but not a sufficient condition for article 15(c) to be engaged.
29. In *C-465/07 Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94 [2009] 1 W.L.R. 2100 the Grand Chamber held that subsidiary protection may be granted, on the basis of article 15(c), in a case where the degree of indiscriminate violence in an ongoing armed conflict entails that a citizen returning to the country or area concerned would run a real risk of an individual and serious threat to the life or person of an applicant, simply by his or her presence there. Furthermore, it held that the more the applicant is able to show that he or she is specifically affected because of personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection, which excludes a purely quantitative interpretation of Article 15(c).
30. The CJEU reaffirmed in *C-285/12 Diakite v. Commissaire General aux Refugies et aux Apatrides* EU:C:2014:39 [2014] 1 W.L.R. 2477 that for civilians as such to qualify for protection under article 15(c) they will need to demonstrate that indiscriminate violence is at a high level:
- ‘30. Furthermore, it should be borne in mind that the existence of an internal armed conflict can be a cause for granting subsidiary protection only where confrontations between a State’s armed forces and one or more armed groups or between two or more armed groups are exceptionally considered to create a serious and individual threat to the life or person of an applicant for subsidiary protection for the purposes of Article 15(c) of Directive 2004/83 because the degree of indiscriminate violence which characterises those confrontations reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat (see, to that effect, *Elgafaji*, paragraph 43).’

31. The nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life or person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants in a direct or indirect manner: *HM and Others (Article 15(c) Iraq* CG [2010] UKUT 00331 (IAC), at [80].
32. In *HM and others (Article 15(c) Iraq* CG [2012] UKUT 409 (IAC), the Tribunal recognised that the threat to life or person of an individual does not have to come directly from armed conflict. It will suffice that the result of such conflict is a breakdown of law and order which has the effect of creating the necessary risk.
33. In *AS (Safety of Kabul) Afghanistan* CG [2020] UKUT 130 (IAC) the Tribunal provided country guidance confirming that there is widespread and persistent conflict-related violence in Kabul. However, the proportion of the population affected by indiscriminate violence is small and not at a level where a returnee, even one with no family or other network and who has no experience living in Kabul, would face a serious and individual threat to their life or person by reason of indiscriminate violence.
34. I observe that the Judge's attention was drawn to *AS (Safety of Kabul) Afghanistan* CG [2020] UKUT 130 (IAC) as noted at §§47 and 52 of the decision. Country guidance cannot, and does not purport to, cover definitively every permutation of fact or circumstance which emerges. Rather, it is a very important starting point, is to be taken into account, and carries significant weight: *SB (Sri Lanka) v. Secretary of State for the Home Department* [2019] EWCA Civ 160, at [70], [75]. If it is not to be followed, a material and durable change in circumstances is to be identified: *SMO, KSP & IM (Article 15 (c); identity documents) Iraq* CG [2019] UKUT 00400 (IAC), at [209]-[211].
35. It is entirely unclear as to whether the Judge's allowing of the claimant's humanitarian protection appeal was on article 15(c) grounds. §60 of the Judge's decision simply fails to engage with the considerations relevant to article 15(c) identified above. There is no express engagement as to whether the claimant faces a serious and individual threat to his life or person on account of indiscriminate violence. There is no engagement with the guidance provided by the Court of Appeal in *QD and HA (Iraq)*. Rather, the basis for allowing the claimant's humanitarian protection appeal was identified in the following terms:
  60. I do however find that the appellant is [at] real risk of suffering serious harm on return to Afghanistan as an individual living alone without a support network in Kabul. He will be unfamiliar with how to access basic services, including housing and healthcare. He has no experience of working in Afghanistan. His age and circumstances, including the fact that he will be viewed as an outside recently returned from living abroad, will likely place him at real risk of suffering serious harm from criminal gangs and non-state agents ...
36. Consequently, I find that if the Judge sought to allow the claimant's appeal under paragraph 339CA(iv) the reasoning is deficient and materially erroneous in law.
37. In any event, if the Judge concluded that the claimant succeeded under paragraph 339CA(iv), the simple failure of engaging with relevant country guidance would alone be sufficient to establish a material error of law.

38. Ms. Amin and Mr. Lindsay were in agreement that the reasoning was consistent with a finding made in relation to article 15(b) of the Qualification, as transposed by paragraph 339CA(iii) of the Rules and I agree. However, such finding is contradictory to the finding at §59 of the decision that the claimant was unable to establish that his protected article 3 rights would be breached upon return to Afghanistan. If the Judge intended to allow the appeal under this paragraph of the Rules, the reasoning is deficient and materially erroneous in law.
39. The Secretary of State's appeal is allowed in respect of the humanitarian protection appeal to the extent that the Judge's decision on this matter is properly to be set aside.
40. Ms. Amin confirmed that the claimant no longer relied on his humanitarian protection appeal. I remake the decision on this matter and dismiss the claimant's appeal.

#### *Article 8*

41. The Secretary of State's written challenge to the Judge's decision under paragraph 276ADE(vi) in respect of article 8 rests upon inadequate reasons being provided for finding that relatives in this country would not continue to provide support to the claimant upon his return to Afghanistan as they had done for the previous decade, and further the claimant could secure support from his family in Afghanistan.
42. Mr. Lindsay confirmed before me that the decision letter of 24 January 2020 was erroneous as to the claimant's family residing in Kabul. They reside in Nangarhar Province. He further accepted that the claimant's consistent evidence, as confirmed in his asylum interview conducted on 17 January 2020, was that he had briefly enjoyed support from an uncle in this country when he arrived aged 16, but his uncle could not continue to provide care and so from the age of 16 he stayed with friends in this country. The Secretary of State's grounds of appeal err in fact in asserting that family members have been supporting the claimant for some 10 years in this country.
43. The Secretary of State's case was advanced before me on the basis that the Judge's erroneous consideration as to humanitarian protection at §60 of the decision adversely infected the subsequent proportionality assessment in respect of article 8. I find that this is not the case. The Judge was reasonably entitled to conclude that the appellant would return to Kabul and live alone. No family member lives in the city. It is uncontroversial that having never lived in Kabul, having spent 12 years living in Pakistan and having left Afghanistan at the age of 16 that 'he will be unfamiliar with how to access basic services, including housing and healthcare.' It is uncontroversial that the claimant has not worked in Kabul. These are all factors that can properly be placed into the proportionality assessment. I further observe that the 'serious harm' assessment made at §60 is not incorporated into the required article 8 assessment. I therefore find that the proportionality assessment was not infected by the error of law made in respect of the humanitarian protection consideration.
44. Mr. Lindsay's secondary submission is that the Judge erred in not placing into the proportionality assessment the ability of the claimant's family in Afghanistan to provide him support, identified by Mr. Lindsay as being visits and remittances. The claimant's parents reside in Nangarhar Province and are farmers. There was no



evidence before the Judge that they had personal contacts in Kabul that would aid their son. Nor was any evidence presented that they could provide regular remittances to their son. The Judge would have had to engage in speculation if she placed such possibilities into her proportionality assessment, and the undertaking of such step would have been an error of law. I conclude that the Judge did not err in law by failing to take into account the ability or otherwise of the claimant's family in Afghanistan to offer financial and personal support.

45. In the circumstances, the Secretary of State's appeal on article 8 grounds is dismissed.

### **Notice of Decision**

46. The decision of the First-tier Tribunal involved the making of an error on a point of law in respect of the humanitarian protection appeal alone, and I set aside the Judge's decision promulgated on 11 March 2021 on that ground alone pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

47. I remake the decision in respect of the humanitarian protection appeal and dismiss it.

48. In respect of the asylum and human rights appeals (articles 2, 3 and 8) the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. I therefore confirm:

- (i) The asylum appeal is dismissed.
- (ii) The human rights appeal on articles 2 and 3 grounds is dismissed.
- (iii) The human rights appeal on article 8 grounds is allowed.

### **Order Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

49. Unless the Upper Tribunal or a court orders otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This order applies to, amongst others, the appellant and the respondent. Any failure to comply with this order could give rise to contempt of court proceedings.

Signed: *D. O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Dated: 7 September 2021