



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

Appeal Number: AA/00363/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 January 2015**

**Promulgated  
On 26 February 2015**

**Before**

**THE HONOURABLE MR JUSTICE GOSS sitting as an UPPER TRIBUNAL  
JUDGE  
UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MAERWAISE AHMADZAI**

Respondent

**Representation:**

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

For the Respondent: Mr E Wilford, Counsel instructed by Lawrence & Co Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department with leave against the decision made by First-tier Tribunal Judge Gillespie promulgated on 26 November 2014 allowing the asylum appeal of Maerwise Ahmadzai ('the respondent',) pursuant to section 82(1) of the Nationality, Immigration and Asylum Act 2002 against the Secretary of State's refusal to grant asylum under rule 336 of HC395 or to grant other

protection, and to give directions for the removal of the appellant from the United Kingdom.

2. The appeal raises two issues. First, the failure by the Judge to consider whether the respondent should be excluded from protection from the Refugee Convention under Article 1F. Second, the alleged logical flaw in the Judge's reasoning in rejecting the objective evidence of an amnesty being in place for former insurgents in Afghanistan, a reluctance to seek amnesty because of continued support for a terrorist organisation not being able to found a legitimate asylum claim.
3. The respondent is a national of Afghanistan with a given date of birth of 1<sup>st</sup> January 1976. He entered the United Kingdom, clandestinely, on 4<sup>th</sup> December 2009. His entry was detected and he claimed asylum immediately upon entry. He was not interviewed in connection with his claim until 18<sup>th</sup> July 2012 and the decision on his claim was not made until 8<sup>th</sup> January 2014. In paragraphs 4-9 inclusive of his Decision, the Judge set out the respondent's allegations of fact. Briefly summarised, the respondent's family lived in the Laghman Province in Afghanistan. The respondent, when he had turned 18 in about 1994 joined his father and brother as a member of Hizb e-Islami. In 1997 that organisation became allied with the Taliban. From 2002 he remained under arms as part of Hizb e-Islami or Taliban defending themselves from the government. In 2007, his father and elder brother together with a Commander Pushtoon were killed in a military bombardment. In 2009, the respondent and his group came under bombardment. He fled with others and made arrangements to leave Afghanistan, which he did, using false documentation. His family have migrated to Peshawar as undisplaced persons to avoid one of his sons being forcibly recruited into anti-government forces. He fears that were he returned to Afghanistan he would be at real risk of persecution on account of his history as a combatant insurgent and be obliged, in order to avoid the authorities and, in response to pressure from his fellow combatants, to re-engage in insurgency against the authorities.
4. The appellant, in her refusal letter of 8<sup>th</sup> January 2014, accepted the respondent was a member of both Hizb e-Islami and the Taliban but asserted he would not be at risk on return and would have a reasonable opportunity of internal relocation in Afghanistan. It was considered his claim had no credibility. The Judge went on to assess the appellant's credibility and made findings that there was no cause arising from his immigration history to treat any part of his evidence as suspect and that he was credible indicating that "he is likely to have attempted if anything to underplay his experience as an active insurgent under arms" [para. 22]. The Judge also accepted the evidence of the expert and found that the respondent would be at real risk of persecution on return.
5. In relation to the first ground of appeal, at an earlier hearing it was directed that the appellant should, if she intended to take such a point, state her position in respect of whether or not the respondent is, by reason

of his past history, to be excluded from protection as a refugee (under Article 1F). This was not raised at the hearing before Judge Gillespie; Ms Isherwood, at the hearing of the appeal, she said there was no copy of the earlier order in the file. Accordingly, no such point was taken by the appellant. The Judge went on to state that no evidence was given by which the respondent could be excluded from protection. It is unclear as to whether the issue was addressed at all either in the evidence or by way of submission. What is clear, however, is that at no stage did the Judge directly address the issue in his decision following his findings of active insurgency as a member of a proscribed group, as Hizb e-Islami is and was, as to whether he was excluded from protection under Article 1F.

6. In the Summary of Conclusions in Gurung (Refugee Exclusion Clauses especially 1F(b) Nepal CG [2002] 04870 at paragraph 151.4 the Immigration Appeal Tribunal stated: -

“It would be wrong for adjudicators to adopt an “exclusion culture” and go searching in every case for exclusion issues under Art 1F. Pragmatism is called for. However, the Exclusion Clauses are in mandatory terms and where obvious issues arise under them these must be addressed by an adjudicator, even if the Secretary of State has not raised them expressly or by implication in the Reasons for Refusal Letter. That may happen prior to the hearing, at the outset of the hearing or during it. This approach is subject only to the need to ensure procedural fairness.”

This followed from an earlier passage in the Tribunal’s Judgment at paragraph 38 referring to the mandatory terms of Article 1F:

“... The mandatory wording admits of no discretion. The question of whether or not a person falls under the Exclusion Clauses is not an optional one: it is an integral part of the refugee determination assessment.”

7. Although aspects of the approach to be taken in resolving whether an asylum claimant should be excluded from protection under Article 1F or not formulated in Gurung (ante) were criticised by the Supreme Court in R. (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department [2010] UKSC and it was laid down how that issue should be resolved in individual cases, it was not suggested the principle that the issue of exclusion must be addressed in all such cases or the way that it was suggested this may be done was incorrect. Indeed, it had earlier been formally approved of and adopted by the Court of Appeal in A (Iraq) v. Secretary of State for the Home Department [2005] EWCA Civ 1438.
8. Accordingly, it was incumbent upon the Judge to address this issue. It was submitted on the respondent’s behalf that the matter had been raised earlier and considered and that, inferentially, the determining Judge did so. We do not agree. The matter was raised at an earlier hearing by a different Judge at an earlier hearing who made an order which seems to have been ignored, in all probability because it never came to the appellant’s attention. The decision itself is, at best, opaque on the issue and it is of significance that, having accepted the respondent’s evidence

as to active participation with Hizb e-Islami and the Taliban and considered he was more actively involved than he asserted and, thereby, rejected the appellant's case, the Judge did not go on to refer to, let alone address Article 1F.

9. By failing so to do, the Judge erred in law and we allow the appeal on this ground. In these circumstances we do not need to consider the second ground of appeal. We set the decision aside and order that the matter be remitted for the respondent's asylum application to be determined by a different Judge.
10. The findings of fact made by the Judge have not been challenged by the appellant and shall, therefore, stand at the next hearing.

Signed

Date **29 January 2015**

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Mr Justice Goss