



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

Appeal Number: AA/02692/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 18 December 2015**

**Decision and Reasons
Promulgated
On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

AA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, counsel instructed by Fisher Jones Greenwood.

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of FTTJ Mace, promulgated on 30 June 2015.
2. Permission to appeal was granted on 23 July 2015 by FTTJ McDade.

Background

3. The appellant entered the United Kingdom unlawfully on or around 18 October 2013 while a minor. He applied for asylum on 22 October 2013 after being encountered by officers from Norfolk Police Service.
4. The basis of the appellant's asylum claim is that he is of Tajik ethnicity. His father transported goods for British and American forces in Afghanistan as well as working for the Taliban. When his father refused a request from the Taliban, the family was attacked. The appellant's father and brother (who was an opium grower) were killed and the appellant beaten and left for dead. The appellant required an operation to repair a ruptured bladder and remained in hospital for six months. He left Afghanistan after learning that the Taliban were aware that he had survived and were expecting him to work for them.
5. During the course of the hearing before the First-tier Tribunal, the appellant gave evidence and expert medical, psychiatric and document reports were available to the FTTJ. The asylum aspect was dismissed solely because the FTTJ considered that the appellant would not be at risk from the Taliban in Kabul. The appeal was allowed under Article 3 on the basis that the appellant would be subject to inhuman and degrading treatment on account of his mental state and the risk of suicide.

Error of law

6. Permission to appeal was sought on the basis that the FTTJ failed to properly consider the internal flight alternative and had therefore not considered whether it would unduly harsh to expect him to move to Kabul for safety. Particularly, in view of the FTTJ's finding that the appellant's Article 3 rights would be breached owing to the risk of him committing suicide.
7. The FTTJ granting permission did so for the following reasons;

"It is arguable that the judge, given her findings in relation to past persecution and the Appellant's mental health condition, failed to give adequate reasons for finding that there would be sufficiency of protection and/or that such previous persecution would not be repeated."
8. The Secretary of State's response of 4 August 2015 said that the respondent opposed the appeal as it was considered that the FTTJ appropriately directed himself. It was said that the FTTJ properly considered whether the appellant could return to Kabul at [30] and [32] of the decision and reasons and it would be unlikely that the appellant would be persecuted. It was said that the appellant did not meet the requirements of paragraph 339K of the Rules. There was no cross appeal in relation to the allowed elements of the appeal.

The hearing

9. Mr Nicholson mainly relied upon his grounds of appeal. The FTTJ had erred by failing to decide a basic principle; that is whether it was reasonable to

expect the appellant to relocate to Kabul in order to avoid persecution. The FTTJ had found that the appellant faced a well-founded fear of persecution in his home area and but not in Kabul, however there was no indication on the face of the decision to indicate that she had applied this test. The FTTJ had found that the appellant was at risk of Article 3 mistreatment throughout Afghanistan and there was no challenge to these findings by the respondent. Given the limited psychiatric support in Kabul along with the finding that the appellant was highly vulnerable, it followed that the appellant was a refugee.

10. Mr Bramble confirmed that there was no cross appeal and that the appellant's credibility was not in question. He accepted that there was "potentially" an error of law relating to the issue of internal flight, however he considered that it was not a material error. The FTTJ had looked at all the circumstances and made clear distinctions in finding that there was no risk of persecution in Kabul but considered that the appellant's circumstances meant that he must succeed under Article 3.
11. In response, Mr Nicholson stressed that all the appellant's particular circumstances were relevant to the issue of reasonableness, which had not been addressed. With regard to materiality, the fact that the appeal had been allowed under the ECHR did not address the appellant's rights under the 1951 Convention. In addition, there might be relative benefits to a grant of asylum compared to what the appellant might receive in relation to a grant of leave to remain under Article 3.

Decision on error of law

12. I concluded that the FTTJ made a material error of law, in that in deciding the outcome of the appellant's claim to be a refugee, she failed to consider whether he could reasonably be expected to relocate to Kabul to avoid his persecutors. While Mr Bramble confirmed that the Secretary of State continued to oppose the appeal, he was unable to point to any indication within the FTTJ's decision and reasons that the issue of the reasonableness of internal relocation had been considered. Given that the appellant's appeal was based on his entitlement to refugee status, the FTTJ did not complete the consideration of this matter. It is trite law that Article 8 of the Refugee Qualification Directive obliges the consideration of the personal circumstances of the applicant as well as the general circumstances where there is a part of the country of origin where he would not be in need of international protection. The matter was clearly in issue before the FTTJ, as can be seen from paragraph 37 onwards of the reasons for refusal which accompanied the asylum decision dated 3 February 2015.
13. In view of Mr Bramble's acceptance, on behalf of the respondent, of the facts of the appellant's case, I decided that I could proceed immediately to remake the decision, preserving the previous judge's findings in their entirety. The appeal proceeded by way of brief submissions only from Mr Nicholson. At the end of the hearing, I allowed the appeal.

Decision on remaking

14. The FTTJ made comprehensive findings in relation to the real risk the appellant would face of inhuman and degrading treatment, which I find provides a ready answer to the issue of the reasonableness of him relocating to Kabul. At [34] of the decision, the FTTJ notes that the appellant would have no family to return to anywhere in Afghanistan, no immediate means of support and was vulnerable owing to his mental health condition. There is reference to the general circumstances in Kabul in terms of the unemployment rate and the increase in rents owing to the massive return of refugees from Pakistan. The FTTJ also records that the provision of mental health care was described by Dr Giustozzi in his report, as “almost non-existent.” At [35], the FTTJ describes, in detail, the limited provision for mental health care, including that in Kabul. At [36] the FTTJ accepted that the appellant’s vulnerability would seriously impede his ability to access such care as was available. In addition, the FTTJ accepted that the appellant’s subjective belief that the Taliban could find him anywhere in Afghanistan together with his severe traumatisation and the fact that he had self-harmed, had resulted in him being at real risk of suicide. The FTTJ concluded that the appellant was at *“serious risk of suicide were he to be returned and as such return would reach the high threshold of a breach of his rights under Article 3.”*
15. In finding that the appellant faced a breach of his Article 3 rights throughout Afghanistan, which is a higher test than that required, Januzi applied, I find that it could not be said that it would be reasonable to expect the appellant to relocate to Kabul. The appellant has demonstrated that he is entitled to refugee status.
16. The appeal is allowed.
17. No fee was paid or was payable and I therefore make no fee award.
18. An anonymity direction was made by the FTTJ, and I consider it appropriate that this be continued and therefore make the following anonymity direction:

“Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.”

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

All the findings of the First-tier Tribunal are preserved.

I remake the decision by allowing the appeal (on asylum grounds).

Signed

Date: 20 December 2015

Deputy Upper Tribunal Judge Kamara