



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/13538/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 13 January 2017  
and 5 May 2017

Determination Promulgated

On 17 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

AS  
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms R Chapman (Croydon Law Centre)  
For the Respondent: Mr L Tarlow (Home Office Presenting Officer) (13 January)  
Mr I Jarvis (Home Office Presenting Officer) (5 May)

**DECISION AND REASONS**

*Introduction and history of appeal*

1. This is the appeal of AS, a citizen of Afghanistan accepted as born [ ] 2000, against the decision of the First-tier Tribunal of 13 October 2016 dismissing his appeal against the Home Office refusal of his asylum claim of 27 November 2015.

2. The Appellant was aged 14 when he arrived in the UK and thus aged 16 at the date of the appeal hearing below. His claim was summarised in the refusal letter in these terms. He lived with his paternal uncle, JK, in Afghanistan, where he worked as a mechanic. A paternal uncle, QS, was a Taliban commander. QS took him for training on using a machine gun, alongside his cousin, JK's son. In 2013 QS came to his house with three members of the Taliban and requested that he help them carry guns and ammunition to a madrassa. Shortly thereafter the police came to his home with foreign troops and arrested him and beat uncle JK. He was questioned at the police station in Pul-e-Khumri and released the same day, and told that he should inform the police, rather than help the Taliban, if he was again requested to carry guns. He feared that if he returned to Afghanistan he would be forced to join the Taliban by QS. Uncle JK arranged for an agent to bring him to the UK. He claimed to have arrived hidden in a lorry on 8 November 2014; he claimed asylum on 11 December 2014.
3. His application was rejected because the Secretary of State did not accept it was credible, and alternatively because even were he telling the truth, he would be able to relocate to Kabul. He was given the details of the Red Cross if he wished to contact them to pursue his family's whereabouts: the refusal letter stated that the Red Cross would not deal with a request made via the Home Office

*First-tier Tribunal decision*

4. On appeal he gave further details of the account above although it remained the same in outline. Having heard oral evidence from him, the Judge found his evidence to be coherent, consistent and plausible, having regard to the background country information. Matters that had concerned the decision maker were, properly analysed, understandable or too minor to count against him: it was unsurprising that he did not know his uncle's date of birth or who had informed against him to the security forces, or that he would not have paid great attention to what QS said about the Taliban. The First-tier Tribunal noted that the Appellant had family in Afghanistan: his uncles QS and JK, his aunt, cousin, and half-sibling twins.
5. Going on to determine the reality of his fears, the First-tier Tribunal accepted, bearing mind the expert report of Mr Foxley relating to the use of informers, the prevalence of forced recruitment and the lack of effective state protection, that he had a well founded fear of persecution in his home area, either from the Taliban who would forcibly recruit him or beat him if he refused to join them, or from the Afghan police and military authorities who would be likely to punish him in the light of his defiance of their enjoinder to disassociate with the Taliban.
6. Moving on to consider whether internal relocation would provide a reasonable solution to his difficulties, the First-tier Tribunal found that, whilst unattached children would face numerous dangers on a return to Afghanistan as shown by the Country Guidelines decision of *AK Afghanistan*, AS would not face life alone in Kabul. JK's son had also faced forcible recruitment, and the expert evidence

showed that JK would not be able to prevent a recurrence given the failings of state protection. Accordingly, given that JK had previously assisted AS himself showing how seriously he took his extended family responsibilities having taken in not only AS but also his Appellant's mother's twins after she died, it could be safely assumed that JK would have relocated to Kabul in order to protect his own son, and that the Appellant could now reside with them there as he had done in the past. It was not suggested that the Appellant had lost contact with JK or that he would need assistance in tracing him.

7. It was in the best interests of the Appellant to be reunited with family members in Kabul rather than living in a country where he had been unable to locate his father (and who there was no reason to think had any interest in seeing him again), notwithstanding his supportive foster family here, educational progress and his involvement with the local cricket club.

#### *Challenge to the First-tier Tribunal decision*

8. Grounds of appeal to the Upper Tribunal contended, drawing out the themes within them, that:
  - (a) Internal relocation should have been assessed by reference to the Appellant's own circumstances, not by reference to the probabilities of his family's movements;
  - (b) In finding that JK took his family responsibilities seriously, the First-tier Tribunal failed to take account of relevant evidence that that uncle had required the Appellant to stop attending school and engage in child labour to support his family financially, working long hours for six days a week, once sustaining a head injury whilst digging a well; and in finding that JK held sufficient assets to fund relocation to Kabul, made a finding unsupported by evidence given the Appellant's own evidence was merely that family assets had been sold to fund his journey to the UK;
  - (c) In finding that Kabul would be a reasonable internal relocation solution because of the likely residence of family members there, no account had been taken of the Appellant's lack of contact with JK since departing the country and the finding that there was no suggestion that family tracing assistance was needed was unsupported by evidence;
  - (d) Mr Foxley's expert opinion was that there was a risk that the Appellant would face detention and questioning at Kabul airport on return and that it was "possible that an enhanced questioning process may be initiated leading to further disclosures and possibly ... detention": this had been overlooked;
  - (e) There was no evidence to support the finding that the Appellant's father (believed to be resident in the UK) would not take an interest in the Appellant were he to be located.
9. Judge Deans granted permission to appeal for the First-tier Tribunal on 13 December 2016, expressly referencing the grounds regarding internal relocation

and risk on return from the security forces at the border, though without placing any limitation on the grounds considered arguable.

### **Error of law hearing and decision**

10. The Upper Tribunal stated, giving Country Guidelines in *AA (unattended children) Afghanistan CG* [2012] UKUT 16 (IAC) at [92] that unaccompanied children would generally face “a risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection.” The issue in this appeal is primarily whether the Appellant would indeed be unaccompanied on a return to Afghanistan.
11. At the error of law hearing I ruled that there were material errors of law in the decision of the First-tier Tribunal: in particular, I accepted that the second to fourth grounds of appeal as I have summarised them above were made out in their entirety.
12. The first ground of appeal was not wholly well founded. It is perfectly possible to imagine cases where different considerations might arise vis-à-vis the reasonableness of internal relocation for a child as opposed to an adult, and where the existence of a child within a family unit might render relocation that would not be unduly harsh into something unreasonable: for example where the parents could work and subsist but where a child would be denied access to education. In such a scenario it would be wrong to adjudicate internal relocation by the standards of what might be expected of an adult. I accordingly accept the underlying proposition of the first ground, that what might be reasonable for an adult might not be so for a child.
13. However, I did not accept that such an error was made out on the facts of this case. On the Appellant’s own account, his uncle and uncle’s son had indeed suffered serious problems because of the Taliban and it was not irrational to infer that there was a likelihood (to the real risk standard) that they would have relocated away from their home area. It is not a misdirection of law to consider the possibility that the availability of family support decreases the likelihood of relocation being unreasonable.
14. That said, I do consider that one aspect of the first ground is made good, which is that one cannot proceed from the simple probability that the uncle *would* have left his home area to the conclusion that he would *necessarily* have moved to Kabul, rather than to another urban centre or place where he might have some familial or ethnic link. A finding made without supporting evidence is clearly unlawful. Furthermore, even if the uncle is residing in Kabul, there is no evidence to suggest that an unaccompanied seventeen-year old with minimal knowledge of the capital city and who lacks contact details for him would have the resources to track him down: at least not without the very support from the Secretary of State by way of family tracing that was in practice ruled out here. Accordingly, whilst I accepted the First-tier Tribunal’s underlying thesis that a rational prognostication as to the

availability of family support in Kabul would be relevant to internal relocation, I do not accept that its application of that thinking was lawful.

15. The second ground plainly had force. The First-tier Tribunal considered that it would be reasonable (on the basis that the Appellant *could* find his uncle in Kabul) for their prior life together to resume. The question of internal relocation falls to be assessed domestically as part of the Immigration Rules (Rule 339O) though in terms representing a transposition of Article 8 of the Qualification Directive. The enquiry thus primarily focuses, as a matter of European Union law, on the question as to whether internal relocation is “reasonable”, an open-textured question upon which the section 55 duty of safeguarding and promoting child welfare plainly bites: indeed Recital (12) to the Directive sets out that “The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive.”
16. UNHCR in *Child Asylum Claims* (an important resource referenced from time to time by Home Office Guidance) at §55 make the point that

“The ‘reasonableness test’ is one that is applicant-specific and, thus, not related to a hypothetical ‘reasonable person’. Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation including their treatment of the risks facing children in institutional care.”

And at §56

“What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation. Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.”

17. Article 19(1) of the Convention on the Rights of the Child sets out that:
 

“1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”
18. The First-tier Tribunal did not take account of whether considerations such as the forced labour visited upon the Appellant by his uncle in assessing whether relocation predicated on the prior arrangements continuing would be reasonable, having regard to the legal matrix identified above.
19. As to the third ground, I accepted that there was no evidence to indicate that family tracing support would not have assisted the Appellant: or to put it another

way, it was clear that family tracing, if viable, would have been an affirmative advantage to the Appellant. It might, for example, have located his uncle. The Appellant stated that he had sought to contact him using community links, which is often a process which doubtless often offers the best prospects of finding a family member via networks within a diaspora. Lord Toulson stated in *MA and AA (Afghanistan)* [2015] UKSC 40 §73: “If the appellant has identified people who might be able to confirm his account, but the respondent has not pursued that lead, the tribunal might fairly regard the appellant's willingness to identify possible sources of corroboration as a mark of credibility, but this would be an evidential assessment for the tribunal. There is no presumption of credibility.” Given the Appellant's evidence was generally accepted as credible, his unsuccessful attempts to locate his family himself should have been considered as at least potentially corroborative of his inability to do so.

20. The fourth ground related to the evidence provided from Dr Giustozzi relating to the possibility of interrogation on return that might reveal information regarding the Appellant's association with the Taliban. There is no reference to this in the decision, and that represented a failure to take account of a relevant consideration, given that generally favourable credibility findings were made as to the Appellant having received arms training from them.
21. The final ground related to the possible presence of the Appellant's father in the United Kingdom. Given that he has not been located, and that the First-tier Tribunal's comment as to his possible willingness arises in the context of some comments relating more to a general “best interests” assessment than to an enquiry into his entitlement to international protection, it was difficult to see that anything materially turned on that point.
22. I accordingly found that the First-tier Tribunal erred in law and that the appeal was to be re-heard. No challenge having been made to the positive credibility findings of the First-tier Tribunal, I considered it appropriate for the Upper Tribunal to retain the matter and finally determine it in the light of the totality of the evidence.

### **Continuation hearing and decision**

23. No oral evidence was called before me. Some additional country evidence was provided regarding circumstances in Afghanistan now. Mr Jarvis made submissions with realistic brevity, stating that the country evidence did not necessarily impel the conclusion that the Appellant would be at risk at the airport though acknowledging that that seemed to be a possibility from the expert report, which was a balanced and fair review of the available evidence. The Appellant's relocation to Kabul, risk on return aside, would not reach the high threshold recognised by the House of Lords in *AH Sudan*. Ms Chapman relied on her skeleton argument, which is available on file, arguing that the expert's conclusions were well-reasoned and reliable, and determinative of the appeal. If border risk

was not accepted, then there was a real chance that the Appellant would face life in Kabul as an unaccompanied minor, which would be unduly harsh.

24. The critical aspect of the expert evidence is where Mr Foxley considers the risk on return at Kabul airport. His opinion is that it would be reasonable to assume the Appellant would undergo brief questioning at the airport though one could not be confident as to the detail, scope, scale or intent of that process. Nevertheless one could anticipate that the Appellant's background including his uncle's Taliban membership and the subsequent police interest in the family that ensued might well be exposed, either because of enquiries set off by the documents he carried, his own revelations under questioning, or because his name or that of his father had been recorded in a centrally accessible database. Dissembling could put him at greater risk of harm. Any such enquiries could be anticipated without formal due process and arrest, arbitrary detention and interrogation was possible.
25. It seems to me, applying the necessary anxious scrutiny to this aspect of the appeal, and having regard to the appropriate lower standard of proof, that there would be a real chance of the Appellant facing persecution for reasons of attributed political opinion on a return to Kabul. In *Sivakumaran* [1988] 1 AC 958 the House of Lords accepted that the same standard of proof applied for prognosticating future risks of harm in an asylum claim as prevailed in extradition cases: when deciding whether an applicant's fear of persecution was well-founded it is sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a Convention reason if returned to his own country. In this regard, there is no significant difference between such expressions as "a reasonable chance", "substantial grounds for thinking", and "a serious possibility" as means of describing the degree of likelihood. These days the concept is often summarised as whether there is a "real chance" of the feared persecution eventuating.
26. It seems to me, reading Mr Foxley's opinion in the broader context of the established facts in this case as found by the First-tier Tribunal, that this relatively low threshold of risk is established. His opinion is consistent with the country evidence generally and seems to me to be balanced and objective; nowhere is it controverted by any positive evidence to the contrary. He does not state that he is certain that the worse case scenario amongst those he envisages will necessarily occur, but he clearly considers it to be a real possibility.
27. A person as to whom the Afghan security forces hold suspicions of Taliban associations may well face detention and mistreatment: the following extracts, taking an example from recent Home Office Country Information and Guidance addressing Afghanistan: Prison conditions, states that
 

"6.1.1 The UN Assistance Mission in Afghanistan (UNAMA)/ The Office of the High Commissioner for Human Right (OHCHR) report of January 2013, 'Treatment of Conflict-Related Detainees in Afghan Custody: One Year On', reported:

'UNAMA found that multiple credible and reliable incidents of torture and ill-treatment had occurred particularly in 34 facilities of the ANP, ANBP and NDS. UNAMA found sufficiently credible and reliable evidence that NDS officials at two facilities systematically tortured detainees mainly to obtain confessions and information.'"

28. Given the Appellant's history as a recipient of arms training from the insurgents in Afghanistan, and his family associations, the kind of enquiries that can be foreseen as taking place on his return might very well place him the category of conflict-related detainee who might be tortured in order to obtain information or elicit a confession from him. As he has been detained by the police already in his home area, there must be a real risk that the suspicions previously held with respect to him will be renewed, either because of enquiries made of his home area in order to establish his identity, or due to his name or that of his uncle appearing on centralised records. At that point there is a real risk that ill-treatment such as that reported above as occurring widely in Afghan detention centres would be visited upon him, because of political or religious opinions attributed to him by his captors, given the view taken of the Taliban cause.
29. I accordingly accept that the Appellant would face a well founded fear of persecution on return to Afghanistan.

#### **ANONYMITY ORDER**

The Appellant's claim involves asylum issues and so, unless and until a tribunal or court directs otherwise, the Appellant 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.

Signed:

Date: 5 May 2017



Deputy Upper Tribunal Judge Symes