



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

Appeal Number: PA/01839/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice

**Decision & Reasons
Promulgated**

On 14 August 2017

On 09 October 2017

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**[M K]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Umoh of Duncan Lewis & Co, Solicitors (Harrow Office)

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Afghanistan. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 6 February 2017 refusing his asylum and human rights claim.

2. The appellant had first entered the United Kingdom in 2002. He claimed asylum on the basis that he feared persecution as a Pashtun, as a member of the Hezb-e-Islami Party, the fact that his brother who was missing was a Commander in the Hezb-e-Islami Party and the appellant himself was an ordinary soldier in that party and as a consequence he feared them because they were looking for him. His asylum claim was refused in March 2004 and a subsequent appeal was dismissed on 5 November of that year.
3. The appellant made further representations in 2007 and 2008. He claimed to fear persecution on grounds of imputed political opinion with Hezb-e-Islami and at the hands of Jamiat-i Islami and because his elder brother, Haji Qayuim, was a Commander of Hezb-e-Islami. He also claimed that his other brother was arrested in 1999, taken to the front line but returned after two months having been injured. He said the Taliban had told his father that he and his brother were traitors and that the Taliban wanted revenge. Further representations were refused in July 2008. Subsequently it seems the appellant was removed from the United Kingdom but returned some time in January 2009. He made an asylum claim in June 2011 which was refused and he did not appeal. In September 2012 he expressed a wish to apply for a facilitated return scheme and signed a disclaimer and said he wanted to leave the United Kingdom as soon as possible. On 23 October 2012 a deportation order was made and he was deported to Afghanistan on 19 November 2012. On 4 August 2016 he was encountered in Belgium and identified as a failed asylum seeker who had previously been deported and was sent back to the United Kingdom. He then made the current asylum claim. He claims that his brother was a Commander of the Hezb-e-Islami Party and his life was in danger from the Government and the Taliban. He claimed that after he returned to Afghanistan in November 2012 he spent two or three days in Logar and then the Taliban came to his home and took him away and beat him. He claimed that his brothers had both been taken by the Taliban and they now wanted information from the appellant and his brothers, also weapons that his brothers had. The Taliban accused him of selling weapons and bringing the money to the United Kingdom and passing Taliban secrets to the UK Government. He said he was tortured. He tried to escape but was beaten unconscious and was found the next day by villagers and received medical treatment from a private doctor.
4. The judge noted that the appellant's claim to be in fear of the Taliban was advanced on the same basis as that which led to the refusal of the asylum claim in November 2004. He claimed that the Taliban were against him because they wished to know the whereabouts of weapons that his brothers had, and that the Afghanistan security forces were accusing him of selling arms to the Taliban, and so both entities were after him. The judge noted that in interview the appellant was asked the names of his brothers and gave them as Haji Qayuim and Hassan Ullah. In an earlier interview he had given his brothers names as Hassan Ullah Khan and Shareef Khan. He had not explained why he had never mentioned Haji

Qayuim in the earlier interview or why he had provided a different name for his brother, nor had he explained who Shareef Khan was.

5. The judge said at paragraph 23 of his determination that he found the appellant not to be a credible witness. He went on to set out his reasoning for this. He said at paragraph 25 that following the decision in Devaseelan his starting point was the facts that had been outlined above in the determination. No fresh evidence had been put forward concerning the appellant's involvement with Hezb-e-Islami or his brother's role, and those matters had been adjudicated upon and those facts still stood. The judge did not believe the account of the November 2012 attack. The judge in 2004 had rejected his claim to be a member of Hezb-e-Islami and found that his evidence showed he was forced to fight for the Taliban in common with other villagers and as the background evidence showed. The forced conscription had lasted for about a month and this was a short-lived rank and file forced conscription. Such conscripts were released since January 2002.
6. The judge had accepted that it was reasonably likely that the appellant's older brother was a fighter as the appellant described. He found that there was no risk of the appellant returning to Kabul and his family lived there and he originated from there. He had been found not to be able to account for why the 2002 statement that he made did not mention any involvement with Hezb-e-Islami or say that he was a member. He also had no idea of the political objectives of that group.
7. The judge went on to consider the November 2012 incident. He noted that the appellant had not explained why the Taliban were showing interest in him in November 2012 when his brothers disappeared thirteen years ago at the hands of the Taliban. If they had captured his brothers it made no sense why they would target the appellant or ask him about weapons. He commented that the evidence was inconsistent with the objective evidence as the Taliban had no interest in ordinary citizens who played a low-level role in the past such as the appellant, and he said this was confirmed by the appellant's expert Mr Foxley.
8. Nor did he find credible the appellant's claim that the Taliban were looking for the weapons as the 2004 decision recorded that the appellant had surrendered his weapon to the Taliban and was forced to fight for them. He was now claiming that he had only submitted one of the weapons. They were said to be interested in other weapons, but he found that to be lacking in credibility as he had never mentioned it before in any of his previous claims.
9. The judge noted that in letters sent from prison while the appellant was in detention he said he ran away from Afghanistan previously mainly because he was suspected of spying and did not mention in the letters anything in relation to his brother's disappearance or his membership of the Hezb-e-Islami Group or the surrendering of weapons. In the same letters from prison he also claimed the Taliban burnt his home but he had

not put that evidence in to the judge in 2004, nor before this judge. There was no mention in the letters of any problems the appellant's brother was having with the Taliban before 2012. He now claimed that he was dumped outside his house, having earlier said that it had been burned, and also said he lived with his brother-in-law and his wife in their house. Nor did the judge find credible his claim to have been taken and beaten by the Taliban and left for dead, as if his account was to be believed they would kill him on return and they therefore would not have left him.

10. The judge considered that the appellant's account was inconsistent with the three Rule 35 reports to support his claim of torture at the hands of the Taliban in 2012. It was not clear, the judge said, whether all three Rule 35 reports were available to the appellant's medical expert, Dr Beeks. The judge also noted that Dr Beeks had not all the relevant documentation including a copy of the March 2004 refusal or the First-tier Tribunal Judge's decision of 5 November 2004 or interviews from 2011 and 2016. Also the medical evidence upon which the doctor relied was not provided to the judge at the hearing. It was noted from one of the detention reviews carried out by the respondent that the appellant had claimed that after he was deported in November 2012 the Taliban Army captured him in the district of Logar and took him away 5 kilometres from town. He had not claimed to have been taken 5 kilometres from the town in his evidence before the judge.
11. The judge also noted further inconsistencies in that in his account given to the doctor who examined him in detention the appellant did not mention he was unable to walk unaided for several weeks, or that he was tortured for two days and dumped on the side of the road. Nor was there any mention in Dr Beeks' report of the appellant having been tortured for two days or having to walk unsupported. In fact, Dr Beeks had noted the appellant woke up the same day he was attacked and was taken to the local doctor. There was also mention in his latest asylum interview that he tried to escape the Taliban while riding along on a motorbike, in contrast to the Rule 35 report where he said he was held by them for two days when they tried to recruit him and because he refused they beat him. This also contrasted with his later evidence that he left his brother-in-law's house after two or three days. The mention of recruitment had not been raised in his interview or in his evidence before the judge. In his evidence-in-chief the appellant denied saying he was held by the Taliban for two days but claimed he told the doctor he was taken after two days. The judge did not accept this explanation as he had signed the Rule 35 report and had not clarified that aspect of the record previously. He told the doctor he was tortured because he took money to the United Kingdom and because of this when he returned to Afghanistan they captured him and in the Rule 35 report he did not make it clear why he was tortured. He did not tell the doctor his brother was a member of Hezb-e-Islami.
12. In the Rule 35 report of 30 December 2016 the appellant gave an entirely different and inconsistent account of his capture, the judge said. He

claimed that the Taliban caught him in the village on return to Afghanistan and he thought the people in the village had told them and the police about his whereabouts because he had been in opposition to the Taliban. He had not provided any explanation as to why the Taliban would be interested in him after such a long passage of time. He gave different accounts to the doctor and in interview and to the detention doctor. There was no mention of him being taken away on a motorbike and trying to escape on the bike as he stated in his evidence-in-chief. He made no mention of the Taliban trying to recruit him or that they wanted to know about the weapons his brother had or that he had sold the weapons and taken the money to the United Kingdom. He provided photographs of the scars in his bundle of documents, but the copies provided to the judge were blanks with dark rectangles. His representative was not able to provide original photographs at the hearing, but undertook to provide them subsequently, but at the date of writing the determination no photographs had been forthcoming.

13. The judge also noted that the appellant told Dr Beeks he was detained in Iran for a month in prison and also in Turkey where he was beaten, and the doctor had failed to investigate further his claims of being beaten in Turkey and had relied entirely on his account where he said there were no scars remaining from this beating. This meant the judge could not be sure whether the appellant had received injuries during the claimed beating or not. She also noted a contrast between the appellant having said he had cut his right arm with a blade while still in detention in Dungavel and Dr Beeks recording that he made no attempt at suicide, although she did note the self-harm. As Dr Beeks had not explored other potential causes of his injuries in childhood or during his long journey, or the nature of the beating he received in Turkey the judge gave little weight to her conclusions regarding the scars or the causing of the scars because other obvious and potential causes had not been eliminated by Dr Beeks.
14. With regard to the expert evidence of Mr Foxley and concerning the appellant's mental health she noted what Dr Beeks said in her report of 8 March 2017, but the judge had not been supplied with the medical report dated 6 March 2017 to which Mr Foxley referred. Mr Foxley had not been supplied with Dr Beeks' report and the appellant had not referred to any of these medical aspects of his health in his evidence-in-chief, including the self-harm he claimed occurred in prison. There was no evidence that the appellant suffered from depression or post-traumatic stress disorder other than the conclusions reached by Dr Beeks. Nor had he mentioned mental health issues in his most recent asylum interview or his evidence-in-chief or further representations.
15. The judge considered that Mr Foxley's report did not support the appellant's claim and was inconsistent with the core aspects of the claim. Mr Foxley had been provided with only one witness statement from the appellant and the judge stated at paragraph 59 that Mr Foxley was not shown the 2004 determination, but subsequently at paragraph 63 the

judge referred to Mr Foxley having had the determination of November 2004.

16. Mr Foxley had been unable to trace the appellant's brother but suspected him to be a small-scale local fighter. Mr Foxley also said that the Taliban's ability to target and track the appellant would now be greatly reduced, though if he had been targeted, detained and tortured by them in the past it was plausible that he might remain at risk, but the greatest risk to him was in his home area. This risk was based on the assumption that the appellant's account of being involved in Hezb-e-Islami and the grievances with weapons were true, which the judge considered surprising, as Mr Foxley had the determination of November 2004 where the appellant was not believed. The appellant relied on the letters he claimed to have received from the Taliban and a letter from the village elders. The judge considered that the contents of the letters bore no resemblance to the documents he had identified in the interview, one being from the National Security saying he had been selling arms and one from the Taliban saying he had been saying anti-Taliban things. There was no explanation from the appellant's brother-in-law as to why he went to the elders and was supported by them as in the letters. Mr Foxley had noted the difficulties associated with documents from Afghanistan and had not been asked to determine if they were authentic. The judge did not believe the letters were sent by the Taliban. The letters were also inconsistent with the evidence given by Mr Foxley that the Taliban no longer had control over a Government regime since they were rejected from power in 2001. Their ability to target and track the appellant would be greatly reduced. He would only be at risk from them if he had been targeted previously and the judge had rejected that aspect of his claim.
17. The judge noted that the appellant said he could not return to Logar or Kabul. The judge took account of the relevant country guidance in AK, noting that the appellant said he had no family left in Logar or in Afghanistan. The judge noted the appellant had been in touch with his brother-in-law who had been helping him by sending him letters. He had not provided any evidence to show his brother-in-law and the brother-in-law's wife could not support him on return. The judge said the appellant had not mentioned in his evidence that he could not return to Kabul. It was noted that he had returned twice to Afghanistan and travelled back to the United Kingdom. He had been able to fund these significantly costly trips with the assistance of his brother-in-law. In the 2004 determination the judge had noted that the appellant had his father and other relatives in Kabul who had assisted the appellant before he travelled to the United Kingdom. He claimed his parents had died but had provided no evidence of this. The judge found the appellant could be assisted by his family and in particular his brother-in-law, to resettle. He noted what was said by Mr Foxley about risk on return to Kabul and concluded that the appellant, notwithstanding the changed situation there, could return to Kabul if he wished. In conclusion the appellant was found to lack credibility and the appeal was dismissed.

18. The appellant sought permission to appeal this decision arguing first that the judge had misdirected himself on material matters, particularly with regard to the materiality of the two independent expert reports, he had made adverse credibility findings before considering the appeal, placed excessive weight on consistency and failed to take proper account of the appellant's PTSD when assessing credibility. It was further argued that the judge had not sufficiently reasoned why little weight was attached to Mr Foxley's report and also with regard to Dr Beeks' report. Reference was also made to factual errors including the identity of the documents available to Mr Foxley and the fact that legible copies of the photographs were in fact provided to the court by hand on the second day after the hearing. Permission was granted on all grounds.
19. In her submissions Ms Umoh relied upon and developed the points set out in the grounds. She argued that with regard to the judge's paragraph 32 where he referred to the appellant's evidence being inconsistent with objective evidence, the Taliban had no interest in ordinary citizens who played a low key role in the past, the appellant had said why they were interested in him because of his involvement with the weapons. Also the expert had said that if a person had been a target in the past they could be again. The judge had also erred at paragraph 33. Throughout his evidence the appellant had said he returned one weapon and they were chasing him for the weapons which had been retained by his brothers. He had referred to his brother-in-law with whom he had stayed, rather than his brother, as the judge had said at paragraph 34. It was also denied that the judge was right to describe the appellant's account of how he tried to escape when captured by the Taliban as being inconsistent in material respects as the judge had done at paragraph 36. The judge had not explained how having all the Rule 35 reports might have assisted Dr Beeks in coming to her conclusions. The photographs to which the judge referred at paragraph 48 had in fact been provided two days after the hearing. It was also wrong to describe the appellant as being inconsistent as the judge had done at paragraph 38. The matter had simply been expressed in different terms. The judge had exaggerated the appellant's evidence as set out and considered at paragraph 45. It was explained at paragraph 7 of the appellant's statement and also at paragraph 15. The judge had referred to Dr Beeks failing to investigate the appellant's claim of having been beaten in Turkey and with regard to him cutting himself. This was an error however as the appellant had had his suicidal thoughts when he was in Leeds but not in Dungavel, so it was not the same incident. The judge had given little weight to the medical evidence in paragraphs 50 and 51, but the expert had followed the Istanbul Protocol in assessing the appellant and the judge's failure to attach weight to the report was an error. In addition the judge had erred at paragraph 53 in concluding that the reference to a medical report of 6 March 2017 and one of 8 March 2017 were different. In fact it was a typographical error and it was the same report. This was clearly the case as no other medical report had been provided. It was not a reason for non-reliance on the report. There were references to the Istanbul Protocol within Dr Beeks' report and

it was also set out in an Appendix. The judge had also erred in fact at paragraph 76 with regard to the appellant not mentioning in his evidence that he could not return to Kabul. In fact there were references to this to be found, for example at paragraph 10 of the appellant's statement. The judge had not considered changes in the appellant's circumstances since 2004 in placing the reliance that he did on the 2004 determination. The determination was unsafe and should be set aside.

20. In his submissions Mr Jarvis argued that even if there were minor errors by the judge they were no more than peripheral matters and it was necessary to consider the claim overall, bearing in mind the significant volume of evidence the judge had had to consider. The context of the appellant's immigration history was also of relevance. The judge had not failed to comply with the Devaseelan guidelines. The decision was lawful even if there were a couple of errors with regard to such matters as the relationship between the appellant and the person in Afghanistan, i.e. whether brother or brother-in-law and whether the doctor had taken into account the Istanbul Protocol. It was clear, for example, from paragraph 40(4) of Devaseelan that facts personal to the appellant which were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. The judge had not treated the decision in 2004 as being final. Paragraph 25 of the determination set out the correct test. No further compelling evidence had been produced. The judge had considered all the post-2004 evidence. Reliance was placed on what was said in HH (Ethiopia) [2007] EWCA Civ 306 at paragraphs 14 to 16 with reference to the decision in Mibanga [2005] EWCA Civ 367. It was clear that no rule of law had been laid down as to the order in which judicial fact-finders had to approach the evidential materials before them. It could not properly be said that the judge had sidelined the expert evidence but he had engaged with the evidence of both experts, had described their limitations and commented on what could have been said. It was relevant to note that although the appellant claimed to have been ill-treated by the Taliban he had undertaken a long and hazardous journey and had been ill-treated in Iran and Turkey. Reliance was also placed on MO (Algeria) [2007] EWCA Civ 1276 at paragraphs 16 and 17 where, among other things, it was said that provided the medical evidence was considered in the context of the consideration of the credibility of the appellant, no error of law would be disclosed, and the fact that there were inconsistencies, maybe medically explicable, did not deprive the fact-finding Tribunal of the right to rely upon such inconsistencies provided the Tribunal took into account the medical view.
21. With regard to the points made by Ms Umoh, it was argued that the judge had made lawful findings. It was relevant to note that it was implausible for the Taliban to wait thirteen years to pursue the appellant and that went back to the initial claim which had been rejected by the AIT. It was clear that the judge had understood the expert's report and it was clear from

the expert's evidence as quoted at paragraph 62 of the judge's decision that the greatest risk of being targeted would be on return to his home area. The expert's evidence also was that the Taliban no longer had control over a Government regime since their ejection from power in 2001 and their ability to target and track the appellant would be greatly reduced. The judge had not accepted that the appellant had been targeted previously and it was only on that basis that he would be at risk from the Taliban. If there was an error about whether it was the appellant's brother or brother-in-law as referred to at paragraph 34, that did not go to the core of the claim as the core had already been rejected with regard to any adverse interest. Also with regard to paragraph 36 and the inconsistency identified by the judge, that was a matter which it was appropriate to highlight. It was open to the judge at paragraph 71 not to accept that the appellant departed after two days because he claimed to the doctors in detention that he was detained and tortured for two days.

22. With regard to the medical report, it was unclear what evidence had been disclosed to Dr Beeks. The judge had lawful reasons with regard to the weight he attached to her evidence. Whether or not photographs were handed in in time did not really take the case any further as the judge was not an expert on scarring and had to assess the expert evidence.
23. With regard to Ms Umoh's arguments about paragraphs 38 to 40 and 41 to 43, again, if the expert was asked to comment on the claim then they had to be given all of the relevant material, so if they were not given all the material, historically that was relevant and it was not known whether it would make a difference to what they said. The observation at paragraph 38 was perfectly permissible since the appellant had not claimed at the hearing that he was taken 5 kilometres from the town. The judge had not exaggerated the findings. Even if the judge had erred with regard to the doctor's consideration of the Istanbul Protocol, this was peripheral and reasons had been given for the lack of weight attached to her evidence. The judge had made findings in paragraph 56 with regard to the alleged medical difficulties experienced by the appellant. He had obtained private medical treatment in Afghanistan.
24. With regard to return to Kabul, the appellant had said he could not go there, but as the judge pointed out in 2004 his historical evidence was that the family were living in Kabul and his movements across continents had been funded by his family. The judge made a sound decision about the presence of family in Kabul. The core of the claim had been rejected historically and by the judge after the hearing. The change of circumstances in Kabul was addressed at paragraph 85 and the country guidance had been applied. The appeal should be dismissed.
25. By way of reply Ms Umoh argued that with regard to Kabul the appellant's brother-in-law was still in Logar and had never been in Kabul. The appellant's father and uncle had been there but had died. This was relevant to his ability to return to Kabul. With regard to the factual errors

it was not accepted that these were peripheral, but for example, concerning the 2012 incident, were important. With regard to the Devaseelan issue the judge had failed to treat the earlier decision appropriately but treated it as final and it was necessary to consider the change of circumstances in 2012 and the evidence of the two experts. The judge had erred in sidelining the medical evidence in contrast to what was required to be done as set out in the guidance in MO (Algeria). It was clearly material that the judge considered the doctor had not taken account of the Istanbul Protocol. Paragraph 17 of HH (Ethiopia) was not applicable here. Good reasons had not been given for disagreeing with the medical evidence. There was a failure to consider the new material, in contravention of the Devaseelan guidelines. There were crucial misunderstandings and factual errors which went to the core of the claim.

26. It was common ground that if I found an error of law then the matter should be remitted for a full rehearing in the First-tier Tribunal.
27. I reserved my determination.
28. It is clear that the essence of the appellant's claim to be at risk from the Taliban and from the authorities, is as it was in 2004 when there was an unsuccessful appeal. The judge at the 2004 hearing was clear that the appellant was not a member of the Taliban and had experienced no more than forced conscription for a period of a month and the evidence was that such conscripts had been released since January 2002 and he was reasonably likely to be seen as being innocent, even if his involvement came to light. The judge was not persuaded that the appellant was a member of Hezb-e-Islami. He accepted that the appellant's older brother was a fighter as described by the appellant. He did not accept there was any risk in Kabul where the appellant's father and members of his family still were and from where he originated and where he seemed to have other uncles. He was not in conflict with any powerful warlord and had not shown any other basis to show risk on return.
29. Ms Umoh placed emphasis on the events of 2012 and the medical and the country experts' reports as being matters of difference from the previous situation which she argued were not properly considered by the judge in contravention of the Devaseelan guidelines which require the first Adjudicator's determination to be the starting point but that facts happening subsequently can always be taken into account by the second Adjudicator and that facts personal to the appellant which were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him or her should be treated by the second Adjudicator with the greatest circumspection.
30. At paragraph 25 the judge noted that following the decision in Devaseelan his starting point was the findings in that determination in 2004 and commented that no fresh evidence had been put before him regarding the

appellant's involvement with Hezb-e-Islami or his brother's role. He found that those facts still stood.

31. As regards the Mibanga point, I consider that though the structure of the judge's determination could have been clearer, the conclusion in essence is set out at paragraph 24 of the decision is not a conclusion arrived at prior to consideration of the evidence and other issues, but rather a statement of the views that the judge arrived at as a consequence of considering those matters. After paragraph 24 there is a very detailed assessment of the evidence and it cannot properly be said that the judge had pre-judged the issue. It is a matter I consider of structuring the determination rather than pre-judgment. That is clear from the detail of the consideration given to the medical and country expert evidence as well as the judge's evaluation of the credibility of the appellant's claim to have been ill-treated on return in 2012.
32. It is relevant to bear in mind, as the judge did, the findings of the judge in 2004 that I have noted above. It is also relevant to bear in mind the point emphasised by Mr Jarvis as to the inherent lack of credibility of the claim with regard to the events that occurred in 2012 that might be said to exist in the Taliban taking no action against the appellant previously, although of course it needs to be borne in mind that he was in the United Kingdom and elsewhere outside Afghanistan for significant periods of time during that period. It is also not irrelevant to bear in mind the point noted by the judge at paragraph 22 as to the different names given by the appellant for his brothers.
33. A point made by Ms Umoh was that the judge had erred factually with regard to the appellant saying he had surrendered his weapon and yet the Taliban were said to be pursuing him because they wanted weapons. Her argument was that the appellant had simply surrendered a weapon and there were other weapons which the Taliban were interested in. It is relevant to note however that as quoted at page 5 of the decision letter and the appellant's evidence at the appeal hearing in 2004 he stated that he "surrendered to the Taliban his weapons and was forced to fight for them". It is clearly a use of the plural rather than the singular. It is relevant also to bear in mind that as the judge noted at paragraph 33 the appellant had not previously referred to having only submitted one of the weapons before and they were interested now in other weapons, although he did not have any other weapons. Failure to mention this in previous claims for asylum or representations was clearly a point of relevance. It is also relevant to bear in mind that as the judge noted it lacked credibility that the Taliban if they had such a significant adverse interest in the appellant would not have left him alive if they had taken him and ill-treated him in 2012. Thus as noted in the refusal letter and relied on by the judge, at his interview the appellant said the Taliban beat him unconscious and left him in a field outside the back of his home for the villagers to find him, whereas in the Rule 35 report he said that he was

held for two days by the Taliban who tried to recruit him but refused and after that they beat him.

34. It was also relevant to note that it was unclear exactly what evidence was made available to Dr Beeks. It is clear that she had not been given a copy of the respondent's refusal of 2 March 2004 or the First-tier Judge's decision.
35. As Mr Jarvis pointed out, it is ultimately a peripheral issue whether or not the photographs of the scars were provided in time for the judge to refer to them in his determination. The judge is not an expert on scarring and it is clear, at least from the determination, that he did not see those photographs, even if they had been handed in to the hearing centre.
36. It is also relevant to bear in mind the judge's point that Dr Beeks did not investigate how the appellant was beaten in Turkey while detained there and this is clearly relevant to what the doctor had to say about the scarring on the appellant, the judge concluding that she had relied entirely on the appellant's account when he said there were no scars remaining from his beating in Turkey. I consider these findings were open to the judge. Although the judge clearly erred in considering that Dr Beeks had not taken into account the Istanbul Protocol, as there are several references to it throughout her report and it is annexed to the report, nevertheless I consider that he gave her evidence detailed and careful consideration in the context of the claim as a whole and came to conclusions on it which were open to him.
37. Likewise with the evidence of Mr Foxley, the judge gave detailed consideration to that evidence. He noted that the greatest risk to the appellant was said to be on return to his home area but that this was based, perhaps not surprisingly, on Mr Foxley assuming that the account given by the appellant was true. It is the case as noted at paragraph 63 that Mr Foxley had the November 2004 determination in front of him, and does not appear to have factored that into his assessment, but I do not consider his report can be said to be flawed and indeed the judge did not say that it was simply because he did not take that into account.
38. I should say in passing also that I see no materiality to any mistake made by the judge as between the appellant's brother or brother-in-law at paragraph 34. There is no essential materiality to that. It is relevant to note what was said by Mr Foxley about an absence on the part of the Taliban of interest in ordinary citizens who have played a low-level role in the past.
39. Bringing these matters together, I consider that the judge did not err as claimed. She set out and properly applied the relevant Devaseelan guidance to the claim, and gave appropriate consideration to the events of 2012 and the medical report and the country expert report. Clearly it was a matter of significance that the appellant had been disbelieved in 2004

and in essence he had provided no evidence to indicate any material change from the claim that had been put forward then other than those three pieces of evidence, i.e. the two reports and the events of 2012 which the judge considered carefully and came to appropriate findings on. It was also in my view fully open to the judge to conclude as he did about risk on return. The appellant had not provided evidence to show his brother-in-law and wife could not support him on return. He had been able to fund his travels twice back from Afghanistan to Europe with family support. The judge took into account the changed situation in Kabul as noted at paragraph 81 of the determination, and concluded that the appellant could return there. Again, the background evidence was taken into account in coming to this conclusion. The judge took proper account of the country guidance in AK, in particular at paragraph 85.

Notice of Decision

40. In conclusion therefore I consider that it has not been shown that the judge erred in law in any material respect in his determination and as a consequence that decision dismissing the appellant's appeal stands.

Signed 

Date 06 October 2017

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

This is a fee exempt appeal.

Signed 

Date 06 October 2017

Upper Tribunal Judge Allen

