



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/05049/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Newport**

**On 19<sup>th</sup> September 2018**

**Decision &  
Promulgated**

**On 8<sup>th</sup> October 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY**

**Between**

**KAI**

**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Patyna, Counsel

For the Respondent: Mr Howells, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Afghanistan. The Respondent refused his application for asylum and humanitarian protection in a decision letter dated 8 May 2017. The Respondent also decided that he failed to meet the requirements of the Immigration Rules for leave to remain on the basis of his family life or private life in the United Kingdom.
2. The Appellant appealed the Respondent's decision and his appeal came before First-tier Tribunal Judge Talbot, who in a Decision and Reasons promulgated on 6 November 2017 dismissed his appeal on all grounds.
3. The Appellant sought permission to appeal against the decision of Judge Talbot and permission was granted by Upper Tribunal Judge Pitt, who

concluded that it was arguable that the First-tier Tribunal took an incorrect approach to parts of the expert evidence and potential risk factors on return to Kabul such that the outcome of the appeal could have been different.

## The Grounds

4. Ground 1 asserts that the First-tier Tribunal erred in failing to give good reasons for rejecting the conclusions of Dr Giustozzi, the country expert who had produced two reports in support of his case. It is argued that the Judge accepted that Dr Giustozzi was a reliable expert and accepted that the Appellant's account of his father's military involvement with the Taliban followed by his disappearance after having been arrested and detained by the Afghan authorities was credible. He also found it credible that the Appellant at the age of 20 was obliged to fight for the Taliban for a short period prior to the Taliban's collapse in 2001. The Judge accepted all of the findings of the expert in relation to the likely risk to the Appellant save for those arising out of the Appellant's and his father's Taliban past.
5. It is argued that the Judge's departure from the expert's findings on this issue is at odds with the internal logic of the determination and is inadequately reasoned. It is further argued that the Judge seems to have conflated the findings in **AK (Afghanistan) (Article 15 (c))** [2012] UKUT 163 with the risks arising out of the factors specific to the Appellant, namely his Taliban past. It is argued that the Judge failed to separately address Dr Giustozzi's conclusions regarding the Appellant and his father's Taliban past. It is further submitted that the expert's conclusions regarding the risk to those formerly associated with the Taliban was unequivocal and the Judge formed his own conclusions that the Appellant would not be at risk because of his limited personal involvement with the Taliban and because there was insufficient evidence from objective sources to indicate that this would place the Appellant at sufficient risk of serious harm. Firstly, it is argued that this approach is flawed because the Judge failed to give weight to the status of Dr Giustozzi's report as independent evidence. Secondly it is argued that it is unclear what objective evidence the Judge was referring to as the objective evidence from the Appellant supported his claim. Thirdly it is argued that the conclusion ignored the fact that Dr Giustozzi's report was based on an abundance of objective evidence and fourthly that the Judge appeared to have formed his own view in respect of the country evidence.
6. Ground 2 asserts that the Judge failed to give due consideration to the risk factors when considering whether he could safely relocate. It is asserted that the Judge only considered generic factors and did not conduct a careful and fact specific analysis taking into account the factors advanced by the Appellant.

## The Hearing

7. The appeal therefore came before the Upper Tribunal in order to determine whether there was an error of law in the decision of Judge Talbot and if so whether to set that decision aside.
8. I heard submissions from both representatives. Ms Patyna amplified on her grounds. She submitted that the Judge accepted the expert evidence up to the point of the Taliban association and the Judge did not raise an issue with his analysis or expertise and the departure from the expert's findings did not make sense in the light of the findings. The risk was a specific one, however, and by including country guidance case law in his reasoning he conflated two issues and did not analysis the risk arising out of the Taliban connection. In short, the treatment of the expert evidence was flawed and inconsistent with the rest of the determination and was also flawed because the Judge made his own assumption about the country conditions which were not in issue.
9. If Ground 1 was made out the substantive appeal could be allowed. Internal relocation did not arise. There was risk from the authorities. With regard to Ground 2 the Judge had not made findings in relation to all risk factors.
10. Mr Howells submitted that it was open to the First-tier Tribunal to disagree with the conclusions of the expert on some issues but not on others. At paragraph 27 of determination he found that the Appellant's personal involvement was limited, it occurred a long time ago and forced recruitment was widespread. With regard to his father's involvement, very large numbers of men fought for the Taliban. He was entitled to find that despite the involvement of the Appellant and his father in the Taliban the Appellant was not at risk as a result. Mr Howells accepted that the reference to **AK** was unhelpful because article 15 (c) was a separate issue. In response to Ground 2 that the Judge did not consider whether there were significant obstacles to relocation namely safety and reasonableness. The Judge was aware that the Appellant claimed to have no close family because he referred to that claim at paragraph 11 of his determination. The Judge was aware that he would be returning without family support.
11. In response Ms Patyna submitted that the expert was well aware of the Appellant's chronology. It was in the context of the history of the Appellant that the expert assessed risk.
12. I reserved my decision. Both representatives agreed that I could remake the decision on the basis of the facts as found by the First-tier Tribunal.

## **Discussion**

13. The findings of the First-tier Tribunal in relation to the risk to the Appellant on return are at [19] to [28] of the decision. At [22] he accepted that Dr Giustozzi was an expert and that on the basis of his two reports dated 10 May 2014 and 22 June 2017 he accepted that the Appellant's account of his father's military involvement with the former communist regime and subsequent military involvement with the Taliban followed by his

disappearance after having been arrested and detained by the Afghan authorities were true.

14. The Judge then turned to the issue of risk on return. He accepted the expert's conclusion that the Appellant would not be at risk from the authorities because of his membership of Hizb-e-Islami anymore. He recorded at [25] the expert's conclusion that the family's links to the Taliban remained a source of risk to him from the authorities. He dealt with the specific risk to the Appellant because of his perceived link with the Taliban at [27]:

"I note that his personal involvement with the Taliban was very limited, namely his forced recruitment to their fighting force for a very short period some 16 years ago at a time when forced recruitment of young men was widespread to try and avoid the Taliban's collapse. As for his father's involvement with the Taliban, there is again insufficient evidence from objective sources to indicate that this would place the Appellant at sufficient risk of serious harm, bearing in mind the very large numbers of people in Afghanistan who supported or fought for the Taliban in the past (many of them under duress), as to entitle him to international protection under either Convention."

15. Dr Giustozzi produced two reports in support of the Appellant's claim. The first is dated 10 May 2014 and is in the Respondent's bundle. The key findings in relation to the risk as a result of the Appellant's and his father's past association with the Taliban and are at [15] to [18] and [37]

"15. The risk to (the Appellant) did not end in 2002, with the original wave of revenge taking petering out. The worsening security situation from 2006 onwards has created the conditions for the authorities to detain large numbers of people on the ground of modest or lacking evidence. Given the unsophisticated techniques still used by Afghan security services, one of the most common ways of obtaining information is to imprison people who are suspected of holding useful information and subject them to psychological and physical pressure, including torture. For this reason they tend to arrest large numbers of people in order to interrogate them. The Afghan security organisations continue rounding up suspected insurgents in the thousands; the Afghan Ministry of the interior alone claim to have arrested 5596 in January-December 2010, compared to 2956 in March 2009-March 2010 (the Afghan calendar year). 6700 insurgents were arrested in March 2012-March 2013. According to the ICRC, the number of detainees is rising very fast. By September 2007 it stood at 12,000, up from 5000 a year earlier, reach 16,000 in November 2009 and about 20,000 at the end of 2011. Such a vertical rise must clearly be associated with the insurgency. The majority of the individuals arrested are detained without serious evidence, simply because they are found near the place of an insurgent attack or because they are related to known insurgents. There is therefore a serious chance of mistreatment and physical harm for anybody arrested under the accusation of being linked to the insurgency. Typically, in Afghanistan political recruitment occurs along family lines. Young men and boys are supposed to follow the decisions of the fathers/family heads with regard to their political involvement. While deviation does occur, unless a different attitude is demonstrated the assumption will be that the son follows the path of the father. Often whole communities can be involved with a single political organisation. The involvement of the most senior male in the family with the Taliban, as well as his own, contributes to turn (the

Appellant) in a typical suspect for the authorities, even in the absence of circumstantial evidence.”

16. At paragraph 16 of his report Dr Giustozzi concludes that on returning to Afghanistan, the Appellant will be questioned about his personal background on arrival in Kabul airport. He might also be questioned later by the police if stopped at a check post or during a search. He states that arrests were often being carried out on the basis of the slimmest evidence. He states that the Appellant would therefore be at risk of arbitrary arrest even in the absence of any evidence against him personally. The delay in the police seeking him after the arrest of his father could be explained by the police receiving a report about his presence in the area by a local informer. At paragraph 17 he states that the Appellant’s presence in Afghanistan will not stay secret for long, particularly since he will have to seek a job and accommodation. He states that from the perspective of risk deriving from the state authorities, relocation outside Kabul would make little difference for the Appellant unless he took refuge in Taliban held territory in the mountains. The police would still consider him a potential insurgent in locations other than Kabul.
17. In Dr Giustozzi’s second report dated 22 June 2017 at pages 45 to 66 of the Appellant’s appeal bundle before the First-tier Tribunal, the expert revisits the issue of risk to the Appellant. At page 64 in summary at paragraph 13 he states:

“However, the family’s link to the Taliban remain a source of risk to him from the authorities. As explained in my previous report it is common practice to detain relatives of members of the insurgency, in the assumption that there is a high likelihood of them being involved with the insurgency too. The entire judicial system relies on suspects confessing their crimes, because of the lack of investigative capabilities. The threat from non-state armed groups would persist in his home area of Kapisa.”
18. The First-tier Tribunal accepted on the basis of the expert’s report that the Appellant had given a credible account in relation to his father and his own involvement with the Taliban. Dr Giustozzi gave a fully reasoned conclusion, citing objective sources, as to why he concluded the Appellant would be at risk on the basis of the factual matrix of his claim which was accepted by the First-tier Tribunal. Further, in the refusal letter, the Respondent raised no challenge to the sustainability of the expert’s findings but did not accept them because the expert’s position on risk depended on the credibility of the Appellant’s account. The Judge therefore departed from the expert’s conclusions in relation to the risk to the Appellant not on the basis of the Appellant’s credibility but on the basis of objective risk. He effectively replaced the expert’s conclusions with regard to objective risk with his own. As asserted by Miss Patyna in her skeleton argument, it is well established, that while a judge is not bound to accept the conclusions of an independent expert, the tribunal “must have, and must give, exceptional reasons for rejecting such evidence” (**Y (Sri Lanka) [2009] EWCA Civ 362.**

19. The reasons given by the Judge for departing from the expert's conclusions in relation to objective risk were, as recorded above, that the Appellant's personal involvement with the Taliban was very limited, his forced recruitment was for a very short time, 16 years ago, at a period when such recruitment was widespread and there was insufficient evidence from objective sources to indicate that his father's involvement with the Taliban would place the Appellant at risk of serious harm. I agree with the Appellant's argument that there is no independent foundation for the assumption that because many people have fought for the Taliban in the past, the past association would not constitute a risk category. I find that the Judge failed to give due weight to the status of Dr Giustozzi's report as independent evidence and the fact that the expert had provided clear reasons, based on his analysis of the Afghan socio-political context, explaining why the Appellant's profile would place him at risk in a report which was fully sourced and based on the expert's own expertise. The Judge also failed to adequately explain why he concluded that the objective evidence which he refers to without giving any details in [27] of the decision would allow him to depart from the conclusions of the expert.
20. In the circumstances I find there was a material error of law in the decision of the First-tier Tribunal such that it must be set aside. I preserve the findings of fact made by the Judge at paragraphs 22 to 24. The parties agreed that in the circumstances I can remake the decision on the basis of the findings of fact made by the First-tier Tribunal without needing to hear any further evidence.

### **The Re-making of the decision**

21. The Appellant submits that in remaking the decision I should accept Dr Giustozzi's conclusions as to the risk arising to the Appellant out of his perceived association with the Taliban and make the finding that because the risk of ill-treatment would arise at the hands of the state authorities, internal relocation would not be a viable option. In the circumstances, I am asked to allow the substantive appeal on asylum and human rights grounds. It is further submitted that the Upper Tribunal in **AS (Safety of Kabul) CG [2018] UKUT 118**, which postdates the decision, did not make specific findings of all possible risk factors to individuals in Afghanistan and did not deal with possible persecution by state agents.
22. I have set out the conclusions of Dr Giustozzi as to the risk to the Appellant as a result of his and his father's former involvement with the Taliban. It is clear from those findings that the expert concluded that the Appellant would be at risk of treatment amounting to persecution on return to Afghanistan. The Respondent's objections to the expert's report as set out in the refusal letter of 8 May 2017 did not take issue with the expert's conclusions with regard to objective risk were the Appellant's case found to be credible, but rather rejected the report on the basis that it did not address the fundamental adverse credibility factors. The Respondent has not pointed to any objective evidence that would undermine the expert's conclusions that it is common practice to detain relatives of members of the insurgency, in the assumption that there is a high likelihood of them

being involved in the insurgency too or in relation to the treatment of such individuals by the police. The expert concluded that the Appellant would be questioned on his background on return at Kabul airport, at risk of arbitrary arrest even in the absence of evidence against him personally and would not be able to remain in Afghanistan long without being detected. The risk which is identified derives from the state authorities and at [18] of the 2014 report the expert concludes relocation outside Kabul would make little difference for the Appellant unless he took refuge in the mountains. It is clear therefore that the expert found that the risk emanated from state agents and that relocation was not a viable alternative.

23. I have not been directed to any objective evidence which would allow me to depart from the conclusions of the expert in relation to objective risk to the Appellant on the basis of the facts as found by the First-tier Tribunal. In the circumstances I find that the Appellant has demonstrated to the lower standard of proof that he would be at risk of persecution on return and I also accept the expert's conclusions that relocation would not be a viable option given that the risk emanates from state agents. In **AS (Safety of Kabul) Afghanistan** CG [2018] UKUT 00118 (IAC) the Upper Tribunal did not deal with the question of persecution by state agents and the conclusions in that case do not impact on the expert's findings.

### **Notice of Decision**

The decision of the First-tier Tribunal contained a material error of law and I set it aside.

I remake the decision in the appeal by allowing it on asylum grounds and under Article 3 ECHR.

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

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 26 September 2018



Deputy Upper Tribunal Judge L J Murry