



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

Appeal Number: PA/05654/2016

**THE IMMIGRATION ACTS**

**Heard at Birmingham Civil Justice Centre**

**Decision & Reasons**

**On 29<sup>th</sup> October 2018**

**Promulgated**

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

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**S H  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Richard Martin (Counsel)

For the Respondent: Mr David Mills (Senior HOPO)

**DECISION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge Parkes, promulgated on 27<sup>th</sup> July 2017, following a hearing at Birmingham Sheldon Court on 10<sup>th</sup> July 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of Afghanistan, and was born on [~] 1982. He appealed against the decision of the Respondent dated 19<sup>th</sup> May 2016, refusing his application for asylum and for humanitarian protection under paragraph 339C of HC 395.

## **The Appellant's Claim**

3. The Appellant's claim is that he has been threatened by the Taliban to join them, he lived in the mountains for several months without being discovered by them, and if he was now returned to Afghanistan he would be caught by the Taliban and killed, especially given that the Appellant was harboured by a commander and then suspected of involvement in this commander's murder, detained and then permitted to escape before making his way to the UK.

## **The Judge's Findings**

4. The judge held that the Appellant's account had an inherent inconsistency. He said he hid in the mountains but returned home on a monthly basis even though the Taliban had retained their interest in him and were actually looking for him. His ability to hide for such a long period of time was not consistent with the evidence of the steps being taken to enforce compliance by putting pressure on his family members. His ability to return home on a regular basis will also fall into question the reality of there being any interest in him by the Taliban (paragraph 22).
5. The judge also went on to discuss the report of the expert, Dr Giustozzi, who had said that there was Taliban activity in Logar Province, which had increased over the years. He had gone on to say that the Appellant's claim was plausible that the commander might have lobbied for the Appellant's release. The judge rejected this report as lacking in credibility.

## **Grounds of Application**

6. The grounds of application state that the judge had overlooked the fact that the Appellant had claimed that the guard who enabled the Appellant to escape was from his father-in-law's tribe and had helped him escape through that association. Moreover, Judge Parkes had neglected to attach the appropriate weight to the 37 page report from the expert by treating it as lacking in credibility.
7. Indeed, the judge had stated that,  
"Given the nature of accusation, the loyalties and treachery involved, the Dr's suggestion is entirely speculative and inconsistent. These issues are discussed further below but given the inconsistency of the Dr's conclusion against the evidence he cites I do not find that the report takes the Appellant's case any further forward" (paragraph 19).

It was said however that the judge did not at any stage then discuss the alleged speculations and inconsistencies in the expert report by Dr Giustozzi.

8. Permission to appeal was granted by UTJ Plimmer on 17<sup>th</sup> January 2018 on the basis that the Tribunal had arguably erred in finding that Dr Giustozzi's country expert report did not take the Appellant's case any further forward (at paragraph 19). It was also arguable that the contradictions identified at paragraphs 17 and 18 were more apparent than real and there has been an arguable failure to acknowledge that specific aspects of the Appellant's claim were consistent with the country background evidence.

### **Submissions**

9. At the hearing before me on 29<sup>th</sup> October 2018, Mr Martin appeared on behalf of the Appellant. He placed reliance upon the grant of permission by UTJ Plimmer. He submitted that the nub of the criticism lay in the judge's rejection of the expert report. This was for the following reasons.
10. First, he had referred to there being "a number of contradictions within the report" when describing the "nature of Arbakai commanders in paragraphs 6 and 7" of Dr Giustozzi's report. Mr Martin submitted that if one looks at paragraphs 6 and 7 of the report, there is nothing contradictory about it. What the expert states is that the local militia work on a tribal basis and that "it is therefore plausible that one of the authorities may have lobbied to have the Appellant released". This, submitted Mr Martin, was a neutral description of the situation on the ground. It was difficult to see what was contradictory about it. There certainly were not "a number of contradictions" in this respect. The judge did not identify any.
11. In the same way, secondly, Mr Martin submitted that in relation to "the issue of blood feuds", the judge had given two reasons. First, that the intensity of the obligation to honour a blood feud the decision to keep the Appellant alive, particularly in view of his having been released as mentioned was difficult to reconcile, given that he had killed the commander who had helped him, and there was now a blood feud against him. Second, the suggestion that the guard might have released the Appellant was not credible as it did not invite tribal retaliation. The report did not comment on the Appellant's suggestion that the guard was from his father-in-law's tribe. However, the judge had said that "that still does not explain why he would take such a risk given the deaths of others involved ..." (paragraph 19).
12. Third, Mr Martin submitted that if one had regard to paragraph 19 of the determination there is a reference to the fact that,

"Given the nature of the accusation, the loyalties and treachery involved in the doctor's suggestion is entirely speculative and inconsistent. These issues are discussed further below but given the inconsistencies in the doctor's conclusions against the evidence he

cites I do not find that the report takes the Appellant's case any further forward" (paragraph 19).

Mr Martin submitted that it was difficult to see what was inconsistent or speculative. It was also not the case that matters had been addressed further below. What Dr Giustozzi had done was to offer a balanced approach to the situation.

13. All in all, therefore, Mr Martin argued that the influence of the Taliban and the local police, being the problem in relation to the Appellant's returnability, the credibility of the report, had it been properly evaluated, would have made a difference to the outcome in this appeal, had it not been so roundly rejected by the judge.
14. For his part, Mr Mills stated that he would have to accept that the references from paragraphs 17, 18, and 19 "are not as clear as they could be", but it was possible to work out what the judge was aiming to say about the expert report. First, paragraph 17 itself was not a standalone paragraph. It provided the background. If one looks at paragraph 18 what the judge is concerned about is "the issue of blood feuds" and it was simply not credible, as far as the judge was concerned, to say that the Appellant, who had been in the debt of a commander who had helped him, would then have escaped any threat to him on account of the murder of the commander.

### **Error of Law**

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
16. First, the judge has rejected the country guidance report of Dr Giustozzi at paragraphs 17 to 19 of the determination. The basis of that rejection is not well made out. This is because there is a reference to "the nature of Arbakai commanders in paragraphs 6 and 7" of Dr Giustozzi's report, so as to suggest that his treatment of the way in which these commanders worked was contradictory. However, if one looks at paragraphs 6 and 7 of the report, I agree with Mr Martin, that the treatment of the expert here to the situation before him, is not contradictory. It is neutral.
17. Second, the Appellant had given evidence that the reason why, notwithstanding any debt he might have owed the commander, he was released with the help of the guard was that the guard was from his father-in-law's tribe, and this too, was a matter that arguably did not touch on the issue of blood feuds, in the way contended for by the judge (at paragraph 18).
18. Third, and most importantly, however, the judge refers to Dr Giustozzi's "entirely speculative and inconsistent" report, in relation to "the loyalties

and treachery” that he describes. The judge goes on to say that “these issues are discussed further below” (at paragraph 19) but does not then discuss them”.

19. Ultimately, however, it is important to bear in mind the basic approach to expert reports as set out in the jurisprudence in relation to such reports. This makes it clear that if a judge decides to reject an expert’s advice, he or she (a) must have a sound basis upon which to do so; and (b) must explain why the advice has been rejected: see **M-W (a child), Re [2010] EWCA Civ 12** per Wall LJ (at paragraph 39).

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law (see Section 12(1) of TCEA 2007). I set aside the decision of the original judge. I remake the decision as follows. This matter is remitted back to the First-tier Tribunal, to be decided by a judge other than Judge Parkes pursuant to Practice Statement 7.2(2A).

This appeal is allowed.

An anonymity order is made.

### **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 their 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

Deputy Upper Tribunal Judge Juss

17<sup>th</sup> December 2018