**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/09340/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 26th January 2018** | **On 25th October 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**QANDI [W]**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr E Fripp (Counsel)
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge A. A. Wilson, promulgated on 23rd August 2017 following the hearing at Hatton Cross on 14th August 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.

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## The Appellant

2. The Appellant is a female, a citizen of Afghanistan, and was born in 1953. She entered the UK on 20th February 2016, seeking asylum on arrival, but her application was refused, because the Appellant already had a refugee card from Pakistan and had declared in her visa application in 2014 that for the previous five years she had in fact been residing in Pakistan. On this basis, the Respondent considered that the Secretary of State was entitled to expect the Appellant to reside in Pakistan if she were to be removed there.

## The Judge's Findings

3. At the hearing before Judge A. A. Wilson on 14th August 2017, the Tribunal was concerned about the lack of progress in ascertaining whether the Appellant was realistically removable to Pakistan, a country of which she was not a national. Judge Wilson observed that, "It is deeply unfortunate that despite that delay no real effort has been made to ascertain what if any is Pakistan's attitude to her re-admission to that country as a refugee". Second, the judge went on so far as to say that, "A common sense approach might be that as she had been out of Pakistan for at least eighteen months that they would decline her request for her re-admission". However, this remains a "mere hypothesis" because neither party has sought to ascertain the actual position. Third, at the same time, however, it remained the position that the Appellant "had a Pakistan refugee card" (see paragraph 2 of the determination).

4. In considering the merits of the appeal, the judge went on to say that the first issue was whether there was a real risk that Pakistan would refoul the Appellant to Afghanistan, but that "the evidence filed on that is somewhat limited". There was evidence before the judge from Human Rights Watch stating that mass forced returns were taking place to Afghanistan. However, as the judge rightly observed, whether this applied to somebody such as the Appellant, who was in possession of a valid refugee identity card, remained as yet undetermined. The judge, nevertheless, went on to say that, "It is perhaps an indication that Pakistan would not re-admit her". Nevertheless, the judge held that, "I do not find that is sufficient on its own to justify allowing this appeal" (paragraph 3).

5. Ultimately, therefore, the issue remained as to whether or not the Appellant "is a single elderly person" who would be at risk in Afghanistan. This could only be addressed, the judge reasoned, if and when it was established that Pakistan would not re-admit the Appellant. The judge did not accept the Counsel's argument that the Tribunal should make a decision on that issue now. This was because "she is not at risk on return to Afghanistan now and it is not appropriate to speculate as to future matters". If the Respondent Secretary of State intended to return the Appellant to Pakistan it was up to the Appellant to establish that that was not possible. This had not been done (paragraph 4).

6. In relation to Article 8, the judge held that the appeal had little merit because the Appellant had arrived in the UK claiming asylum stating that she came from Afghanistan and Section 117B applies such that the interest in immigration control was a legitimate consideration for the government of the day (see paragraph 10).

## Grounds of Application

7. The grounds of application state that the judge had erred in not considering whether the Appellant is a refugee by reason of the fact that the Respondent proposed removing the Appellant to Pakistan where she had been recognised as a refugee from Afghanistan in any event. Second, the Appellant argued that the Respondent could not prove that the Appellant would be re-admitted to Pakistan and not be refouled from there to Afghanistan. Therefore, the obligation fell on the judge to consider whether the Appellant was a refugee in those circumstances. Failure to do so led the judge into error.

8. On 13th November 2017, permission to appeal was granted.

## Submissions

9. At the hearing before me on 26th January 2018, the Appellant was represented by Mr Fripp of Counsel and the Respondent was represented by Ms Everett, a Senior Home Office Presenting Officer. Mr Fripp relied upon the simple proposition that in an appeal such as this, refugee status fell to be determined by reference to the situation in Afghanistan. European law, he submitted, was superior to the national law of the UK, and it adopted nationality as a basis for identification of the state which is the reference country for purposes of status determination. Under the Council Directive 2004/83/EC of 29th April 2004, are the minimum standards for the qualification and status of third country nationals or stateless persons as refugees. It is made clear (Article 2(3)) that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account "all relevant facts" as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied (see Article 2(3)(a)). Given that **ST (Eritrea) [2012] 2 AC 135** stated (in the words of Lord Hope) that under Council Directive 2004/83/EC the law went further in some respects than the Refugee Convention "because, for example, it requires a residence permit to be issued as soon as possible where an applicant qualifies as a refugee", it was necessary for the judge to determine whether the Appellant did qualify as a refugee. The failure of the judge to determine whether the Appellant was a refugee by reference to what was agreed as being a country of nationality, namely, Afghanistan, put into error.

10. For her part, Ms Everett submitted that when the Appellant applied for a visit visa to come to the UK, she had stated that she would return back to

Pakistan for which she had a residence permit. The expert report provided in support of her may now give more evidence to raise a concern but this would be a matter for a fresh claim. The fact that the Appellant had refugee status in Pakistan did not mean that she would qualify for refugee status under the 1951 Refugee Convention in the UK as well. The Secretary of State of State had discharged her burden because she had found the Appellant to be habitually resident in Pakistan. She was returnable there.

11. In reply, Mr Fripp submitted that both the Refugee Convention and the Qualification Directive place the burden upon an Appellant only where he or she is status. It is common ground that the Appellant was not status. She was a citizen of Afghanistan. Mr Fripp drew my attention to Macdonald's Immigration Law and Practice (at page 2, 122) and submitted that the country of habitual residence was irrelevant to determining whether the Appellant had a genuine risk of persecution and a well-founded fear.

## Error of Law

12. 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. This is a case where the Appellant is a single elderly person with Afghan nationality. She has been away from Pakistan for the last eighteen months. This was significant enough as a fact for the judge to observe that, "a common sense approach might be that as she had been out of Pakistan for at least eighteen months that they would decline her request for her re-admission" (paragraph 2). There had been a failure to progress matters in this respect on both sides. The appeal was first listed in March 2017 and adjourned after consideration of precisely these issues. When it arose before Judge Wilson in August 2017 matters were no further advanced. Against all of this, there was background evidence from Human Rights Watch that Pakistan was engaged in mass removals of Afghan nationals back to Afghanistan. It was for the judge to determine in these circumstances whether the Appellant was a genuine refugee under the 1951 Refugee Convention for the reasons given by Mr Fripp. The essential question was whether there was a real risk that Pakistan would refoul the Appellant to Afghanistan as a single elderly woman.

## Remaking the Decision

13. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the limited extent that it is to be remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Wilson. However, it is important that I give directions. Given the level of procrastination in failing to ascertain what was likely to happen to the Appellant, were she to be returned to Pakistan, after an absence of 18 months, as a citizen of Afghanistan, it is important that there is a CMR.

This is because also that she has a daughter living in North America, who had been granted refugee status because she served as a chief of staff to the Afghan first lady, and is willing to apply to the UK to give evidence in the Appellant's appeal. During the CMR, it is important that clarification is sought with respect to what the position is in relation to those who hold a refugee card in Pakistan as Afghan nationals that have been out of the country for close to two years. If they are not realistically returnable back to Pakistan, the position then is a very different one, because one has to consider the Appellant's eligibility for refugee status as an Afghan national who is a single elderly woman being returned to Afghanistan.

**Notice of Decision**

14. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge Wilson, after a CMR, in which the issues that I have highlighted, will be specifically addressed.

15. No anonymity direction is made.

16. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 12th March 2018