



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10899/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2018

Decision & Reasons Promulgated
On 08 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

OO (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel instructed by Duncan Lewis & Co, Sols
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Lodge sitting at Birmingham on 24 November 2017) dismissing his appeal against the refusal of his protection and human rights claims which he had brought on the basis that he had a well-founded fear of persecution in Afghanistan on account of a long-standing land dispute and blood feud between his family and General Sufi Sharif, who was said to be a powerful member of the Afghan government. The Judge dismissed his appeal as he was not satisfied *inter alia* that the General ever existed; or, if he did, that he was still alive or in a position to exercise any influence.

The Reasons for the Grant of Permission to Appeal

2. On 17 January 2018 Judge Michael Keane granted permission to appeal for the following reasons: *“First, the Judge arguably perpetrated procedural irregularity capable of making a material difference to the fairness of the proceedings in failing without adequate reasons to adhere to an unequivocal concession made by the respondent when considering the claim for asylum by the appellant’s uncle that General Sharif existed. Second, in the light of the respondent’s unequivocal concession that General Sharif existed. it was arguably irrational of the Judge to suggest as a reason in support of a finding that General Sharif did not exist the opinion of Dr Foxley that he could not positively confirm the General’s existence by reference to independent documentary sources arising from his own researches. Third, the Judge arguably failed to adhere to the principle of fairness in failing to alert the appellant to his tacit finding that he was not bound by the respondent’s unequivocal concession that General Sharif existed.”*

The Rule 24 Response

3. On 12 February 2018 Karen Pal of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. She said that the Judge did not go behind the respondent’s refusal letter which indicated that General Sufi Sharif was part of the administration in the past. The respondent did not accept that the General was still in a position to cause difficulty for the appellant. The Judge found, at paragraph 43, that there was some ambiguity as the identity of the persons identified in the expert’s report. The Judge was entitled to make this finding on the basis of the evidence. The Judge gave reasons for not accepting the expert’s report. In any event, the Judge found on an alternative basis at paragraph 48 that *“the General was either not alive, or not in a position to exercise any influence.”*

Relevant Background Facts

4. The appellant has an accepted date of birth of 1 January 1993. He is recorded as having claimed asylum on 13 July 2015. He was an ethnic Tajik, who spoke Dari. He originated from Kabul province.
5. As summarised in the subsequent refusal decision, his claim was that in the 1990s, General Sufi Sharif (who lived in the same locality as his family) had illegally seized land belonging to his family. As a condition of his family getting the land back, he had forced his father, grandfather and uncle to join the Islamic Society Party of Afghanistan. In revenge, his father had betrayed General Sufi Sharif by handing over all the General’s weapons to the Taliban. When the Taliban Government fell and the Mujahideen took over, the General accused his family of helping the Taliban and he harassed the family in connection with the land dispute.
6. As the result of the problems that his family had with the General, he had left Afghanistan with other family members at the age of seven, and they had travelled to Iran. He remained with his family in Iran for 9 years. He then relocated to Pakistan, where he had stayed for 6 years. Finally, he had made his way to the United Kingdom from Pakistan via Turkey and France.

7. On 18 October 2017, the respondent gave her reasons for refusing the appellant's asylum claim. His account did not tally with external information about the Taliban. In 1996, the Taliban started conquering parts of the country until 2001, when the US-led forces invaded. He said that his family had left Afghanistan when the Taliban were in power. It was not plausible that they had stayed in the country while the Mujahideen, whom his family claimed to fear, were in power; but that the family had left the country when the Taliban, whom he claimed his father supported, were in power.
8. He had not been able to provide any evidence of land ownership or of details of the General's current power and authority. On the information provided, it was not accepted that his family had faced any difficulties in the past. With regard to internal relocation, there was no external information to verify General Sharif's influence and authority.

The Hearing Before, and the Decision of, the First-Tier Tribunal

9. Both parties were legally represented before Judge Lodge. He received oral evidence from the appellant, and from his brother 'AO' who had been granted asylum in May 2010.
10. AO's date of birth was 1 January 1986. His evidence was that General Sharif was a well-known and important person in Afghanistan. He had MPs in the Government. He was a well-known person in Jamiat-i-Islami. He did not want any member of the family to be alive because, if the government changed, they might get the land back.
11. He had been deported from Iran to Afghanistan in 2008. When he returned to Afghanistan, he had stayed at his aunt's house. General Sharif's men went looking for him at his paternal aunt's house, and they had seized his aunt and her husband for cooperating with him. He had managed to escape and to make his way to the UK.
12. In his subsequent decision, the Judge rehearsed the evidence given by the witnesses at paragraphs [9] to [26]; and he set out his findings on the evidence at paragraphs 28-54.
13. The Judge began his analysis with a summary of the evidence given by the appellant and his brother about General Sharif. He then juxtaposed this evidence with the conclusion of the Country Expert that he had been unable to find plausible detail demonstrating the existence and extent of power of Commander or General Sufi Sharif. The Judge noted the submission of Counsel that he was possibly one of the three internet references that Mr Foxley had listed at paragraph 31 of his report. But in his view, the description given by the appellant and his brother did not match any of the three individuals in respect of whom there were references on the internet: "*On the face of it, none of them are Sufi Sharif.*"
14. At paragraph [37] of his decision, the Judge noted that the expert said he could not rule out that any of the three individuals were the General referred to by the appellant: "*Given, however, that the appellant had obtained some of his information from television, I am struggling to understand why the expert cannot confirm his existence. It is in my view noteworthy that the appellant said that he had never seen General Sharif, he had never even seen a picture of him.*"

15. The Judge held, at paragraph [38], that given the expert's objective testimony, he was driven to conclude that either General Sufi Sharif had never existed, or he was not in existence at the present time.
16. With regard to the finding that he had never existed, the Judge expressed hesitation as the Upper Tribunal and the Home Office appeared to have accepted in the past that General Sufi Sharif was a real individual. He went on to give his reasons for not being bound by the previous concession of the Home Office or the previous finding of the Upper Tribunal.
17. At paragraph [48], he said that if his analysis was faulty, and he was bound by the previous "*findings*", he was nonetheless satisfied that the inability of the expert to confirm the existence of General Sharif "*at the present time*" meant that either he was not alive or not in a position to exercise any influence. At paragraph [54], he held that in the absence of any objective evidence that General Sharif was exercising any power in Afghanistan, he was not satisfied to the lower standard that the appellant was at risk on return.

The Hearing in the Upper Tribunal

18. At the hearing before me to determine whether an error of law was made out, Mr Bandegani (who did not appear below) developed the case pleaded in the grounds of appeal to the Upper Tribunal. The appellant had fled to Iran with his family because his father and grandfather were abducted by General Sufi Sharif in 2001. His brother, AO, was deported back to Afghanistan in 2008 and he had to flee Afghanistan once General Sufi Sharif discovered his whereabouts. AO had arrived in the UK in 2008 and was granted refugee status on the same basis as the claim advanced by the appellant. The appellant's uncle was also granted refugee status on the same basis in 2005.
19. Mr Bandegani drew my attention to the documentary evidence which had been placed before the First-tier Tribunal Judge on the issue of the identity and existence of the family's oppressor.

The Concession in the Refusal letter dated 17 December 2008 pertaining to the brother's asylum claim

20. In a refusal letter dated 17 December 2008 addressed to AO, the Home Office noted that in his asylum interview he had said that General Sharif was Fahim's "*top man*", and he feared him as he had accused the family of working for the Taliban (in the period when the Taliban were in power) and he had still got their land. The Home Office said that the "*only*" supporting evidence for Sharif working for Fahim was a blog by a US soldier who had fought with Fahim against the Taliban near Kabul. He said that, after the assassination of Ahmed Massoud, General Sharif, a "*lower commander*" to Fahim (who was a warlord "*underneath*" Massoud) was his principal point of contact with Fahim. The Home Office accepted that Mohammed Qasim Fahim was a high-profile Afghan official who supported the Kazai Government; and that General Sharif was a lower Commander to Mohammed Qasim Fahim. However, it was not accepted that AO had a genuine fear of General Sharif, for reasons which the Home Office had begun to give on page 4, but which suddenly broke off.

The finding of the Upper Tribunal in the uncle's asylum claim

21. In a decision on KO's asylum appeal promulgated on 28 January 2005 (of which only a partial extract is disclosed in the appellant's bundle) the Upper Tribunal held, at paragraph [7], that "*Brigadier Sharif*" featured large in asylum appeals from Afghanistan. He was Commander with the Northern Alliance and was based in Kabul. Whilst he was not a member of the Government, he was clearly someone of influence. The objective evidence to which they had been referred suggested that if someone was involved in serious conflict with a powerful warlord, they were going to be at risk.

The findings of the country expert in the appellant's asylum claim

22. The specific issue which the Country Expert, Mr Foxley, was asked to address was whether he was able to verify whether General Sufi Sharif held a political position in the Afghan Government. At paragraph 30 of his report, he said that in the time available he had been unable to find plausible detail demonstrating the existence and extent of power of a Commander or General Sufi Sharif.
23. As he explained at 31, the titles of Commander and General were often self-styled, adopted by the person themselves, rather than representing an official, military position based on an organised, armed force. It could represent a range of military responsibilities, from a major military warlord (such as Ahmed Shah Massoud) commanding tens of thousands of personnel across several provinces, down to a village militia fighter, manning a checkpoint, in charge of 4 or 5 men.
24. Mr Foxley said that he found three internet references: (a) General Mohammed Sharifi, a Tajik born in 1960 with a role in the Afghan Intelligence Directorate; (b) Lieutenant General Mohammed Sharif Yaftali, Chief of General Staff for the Afghan National Defence & Security Forces, from Badakhshan province; and (c) General Mohammed Sharif Safi, the Military Prosecutor in Kunduz.
25. At paragraph 32, Mr Foxley said that these sorts of fragments did not give them much to work on, and he had been unable to rule any of these in or out, based upon the information that the appellant had provided.

The Reply

26. In reply, Ms Fijiwala adhered to the Rule 24 response settled by her colleague.

Discussion

27. Ground 1 is that the Judge failed to take account of the fact that the respondent had granted international protection to the appellant's brother and uncle for the same reasons advanced by the appellant in his claim for international protection.
28. I do not consider that there is any merit in this ground, as pleaded. The Judge clearly took into account that the appellant's brother and uncle had successfully advanced a similar claim to that made by the appellant, as paragraphs [38]-[43] of his decision are directed at explaining why, despite the favourable outcomes for the appellant's

brother and uncle, he was satisfied that it was open to him to re-examine the appellant's account "*ab initio*".

29. Ground 2 is that the Judge was prohibited, as a matter of law, from going behind the concession of the respondent made in the decision letter directed to AO.
30. As Mr Bandegani clarified in oral argument, his instructions are that the extract from the decision letter dated 17 December 2008 was produced by the Presenting Officer at the hearing. He submits that by producing the decision letter containing this concession on the morning of the hearing, the Presenting Officer clearly sought to maintain the concession.
31. There is a clear anomaly in the refusal letter. It only purports to be 4 pages long, and it ends prematurely. In short, it presents as an abandoned draft letter which was never served, which is consistent with the fact that the appellant's bundle only contains a letter dated May 2010 granting asylum to AO.
32. I do not consider that, by producing this document, the Presenting Officer was making a concession that the General Sharif referred to in the letter, whose existence was accepted by the Home Office in 2008, was the oppressor of the appellant's family.
33. The Judge goes on to refer at paragraph [49] to Fahim's obituary, which shows that he died in March 2014, holding the office of Vice President of Afghanistan. This obituary is also not in the appellant's bundle. So, insofar as it is material, I infer that the Presenting Officer produced both documents in order to show that the General Sharif referred to in 2008 had lost his patron, and hence had lost his power, which is the finding of fact made by the Judge in the same paragraph.
34. Whatever her reasons for introducing the letter into evidence, I accept that it was helpful to the appellant's case insofar as it showed that in 2008 the Home Office had been able to find one piece of objective evidence that supported AO's account of the identity and influence of the family's alleged oppressor.
35. I do not however consider that the Judge was legally prohibited, as Mr Bandegani puts it, from going behind the concession made in the letter of December 2008. It was open to the Judge not to treat himself as bound by the concession for the reasons which he gave.
36. The first was that the description given by AO in his asylum claim of General Sharif did not match that given by the uncle in his earlier asylum claim. In short, the uncle described a person with a higher status than was indicated by the description of General Sharif in the blog post, and indeed as was indicated by the oral evidence of the appellant and his brother at the hearing. The contrast was pointed up by the Judge at paragraph [40] where he said: "*It would indeed be extraordinary if Brigadier Sharif had been reduced to the rank of General Sharif even though he would appear to be under the patronage of the Vice Present of Afghanistan.*"
37. Secondly, it was open to the Judge to find that none of the three living candidates identified by the Country Expert through internet research matched the description given by the appellant and his brother, which was of a person by the name of Sufi

Sharif who allegedly remained *“a powerful member of the present Government exercising power through the police and army and has been such a figure for some considerable time.”* (paragraph 33).

38. Ground 3 is that the Judge was irrational in treating the expert’s *“inconclusive, limited and at worst neutral assessment”* as constituting a good reason for going behind the positive concession made in the refusal letter of December 2018 and *“subsequently maintained by the primary decision maker.”*
39. I consider that the error of law challenge is no more than an expression of disagreement with findings that was reasonably open to the Judge for the reasons which he gave. The Judge acknowledged in paragraph [34] Mr Foxley’s evidence that the title *“General”* might be self-styled, and his observation that the explanation for the absence of plausible detail demonstrating Sufi Sharif’s existence and the extent of his power might be that data and documentation had been destroyed. The Judge continued in paragraph [35]: *“I cannot however, find, given the descriptions of the General by the appellant and his witnesses and references to Government, Army and police, that ‘General’ is an honorific title and, given that he is exercising power at the moment on the appellant’s evidence I cannot see why Mr Foxley is unable to confirm his existence.”*
40. At paragraph [36], the Judge addressed the question of whether the General Sharif referred to by the appellant and his witnesses was one of the three individuals of whom reference had been found by the expert on the internet. It was open to the Judge to find that, on the face of it, none of them were *“Sufi Sharif”*, for the simple reason that none of them had this precise name, although the appellant and his brother had always consistently maintained that this was the oppressor’s name.
41. Mr Bandegani pleads that Mr Foxley did not say anything in his report that contradicted the concession made by the respondent in the refusal letter of December 2018. But he also did not say anything in his report to support the continued existence of the General Sharif referred to in the blog. Moreover, as the Judge noted, the appellant did not advance a positive case at the hearing that one of the three individuals identified by the expert was his family’s oppressor. The burden of proof rested with the appellant to show substantial grounds for believing that his account of past persecution and future risk was true. Given the time which had elapsed since the family’s departure from Afghanistan in 2001, it was incumbent upon the appellant to show that the alleged oppressor of the family since the 1990s still existed and still remained an influential person in Jamiat-i-Islami. Since the appellant and his brother insisted that their oppressor continued to have a media profile it was by no means perverse of the Judge to find that the expert evidence damaged the credibility of the core claim, rather than supporting it, or being at worst neutral.
42. Ground 4 is that the Judge acted unfairly by not giving the appellant an opportunity to secure the expert’s comments and/or allowing the appellant the opportunity to make representations.
43. The appellant knew from the contents of the refusal letter directed to him that the respondent did not accept any material aspect of his account of past persecution or future risk. The appellant’s advisers prepared for the hearing in the knowledge that both past persecution and future risk were an issue; and that one of the crucial sub-

issues was the existence of, and current influence exercised by, General Sufi Sharif. Since the refusal letter of December 2008 was only produced by the Presenting Officer at the outset of the hearing, the appellant's legal advisers did not prepare for the hearing on the premise that the existence of a General Sharif had been conceded by the Home Office in 2008.

44. It would have been open to Counsel for the appellant to seek an adjournment, following the disclosure of the letter, so as to enable the expert to see if he could find a connection between one of the three Sharifs that he had found on the internet with the General Sharif referred to in the blog. However, Counsel for the appellant was content to proceed with the hearing on the evidence as it stood, which included the late disclosure of the refusal letter extract of December 2008 and Fahim's obituary. In the circumstances, I do not consider that there has been procedural unfairness.
45. Ground 5 is that the Judge had erred in law in failing to determine whether there was a real risk of persecution to the appellant in Kabul, as either being a westernised returnee or as a returnee from a western country.
46. The Judge addressed the issue of the appellant's returnability to Kabul at paragraph [56]. In light of the Judge's primary findings of fact on the core claim, it was open to the Judge to find that the appellant's return to Kabul would be safe, reasonable and not unduly harsh. Following **AS (Safety of Kabul) Afghanistan, CG [2018] UKUT 00118 (IAC)**, the Judge did not err in law in not giving express consideration to whether the appellant would face a real risk of persecution or serious harm as a returnee from the West.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

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 7 June 2018

Judge Monson

Deputy Upper Tribunal Judge