



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01912/2019

THE IMMIGRATION ACTS

Heard at Bradford
On 24 September 2019

Decision and Reasons Promulgated
On 26 September 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

K A
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain instructed by Alison Law Solicitors LLP

For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Hillis promulgated on 6 June 2019 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The Judge notes the appellant is a citizen of Afghanistan born on 1 January 1998 who arrived in the United Kingdom on 5 September 2018 and who claimed asylum the same day.
3. The Judge had the benefit of considering not only documentary evidence but also of seeing and hearing oral evidence being given, as noted in the decision under challenge. The Judge's findings are set out from [28] in which the Judge notes the appellant's age, gender as a male, nationality, Islamic faith, and relationship to his brothers is not in dispute in the appeal.
4. The Judge had the benefit of also receiving oral evidence from one of the appellant's brother's Sarwar who lives in Birmingham and who confirmed that he and another brother, also in the UK, take care of the appellant and his needs in this country and who confirmed he could send the appellant money if the appellant was returned to Kabul [34].
5. The Judge noted an earlier determination by First-Tier Tribunal Judge Rose in a decision promulgated in 2018 to which the Judge refers at [37] in the following terms:

“37. I concur with Judge Rose's findings of fact in his Decision of 2018 and conclude that the Appellant has simply attempted to adopt the account given by his brother, Sarwar, which was not found to be credible by Judge Rose and that the Appellant has failed to show, to the lower standard required, that he refused attempts by the Taliban to recruit him to their ranks as claimed. The Appellant's account of how, where, when and by whom his three older brothers were killed in Afghanistan is not consistent with the account given to Judge Rose by Sarwar in 2018. Additionally, he stated in his oral testimony that Sarwar gave him the details of this account after he arrived in the UK.”

6. The Judge did not accept the appellant's account that his brother no longer has any contact details for their parents [39] and it was found there was no new evidence before the Judge to show that Judge Rose's findings of fact were in error [40].
7. At [41] the Judge finds that the appellant had failed to show to the lower standard required that his brother was by 2017 still not in contact with his parents in Afghanistan and that the appellant was not deliberately sent to the UK to join his brothers. At [42] the Judge finds the appellant's account that he did not know where Sarwar and Momin were in the UK when he arrived was equally not plausible.
8. At [46] the Judge finds the appellant was simply following his father's wishes to come to the UK to join his brothers and that is the reason why he did not claim asylum in Greece, Italy or France.
9. The Judge considers the issue of whether the appellant could relocate to Kabul referring to the country guidance case of *AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)*.

10. The Judge also considers an expert report provided by psychological therapist between [50 – 55] giving reasons why little weight was placed upon that report.
11. At [55] the Judge writes:

“55. I conclude that I can place little evidential weight on the experts report, for the reasons set out above, that the Appellant will suffer undue hardship on removal to Afghanistan due to any mental health difficulties. There is no submission before me that the Appellant has a health condition that engages the terms of Article 3 of the ECHR. At answer A12 the Appellant stated he had no medical conditions and there was no evidence adduced at the appeal hearing that he had sought or been offered any treatment following the receipt of the experts report on 15 March 2019.”

12. The Judge finds that the appellant, on his own account, cannot be anything higher than of low-level interest to the Taliban meaning he came within headnote (i) of AS which reads:

(i) *A person who is of low-level interest for the Taliban (i.e. not a senior government or security services official, or a spire) is not a real risk of persecution from the Taliban in Kabul.*

13. The appellant’s account was that he faced a real risk of persecution on removal to Afghanistan at the hands of the Taliban.

14. The Judge concludes at [59]:

“59. I conclude on the evidence taken as a whole the Appellant has failed to show, to the lower standard required, that he faces a risk of death, persecution or ill-treatment on removal to Kabul Afghanistan for a reason recognised by the Refugee Convention and, in particular, an imputed political opinion. He can safely relocate to Kabul city where he will be able to receive financial support and emotional support using modern methods of communication from his two brothers in the UK. Additionally, he will be able to turn to his family in Afghanistan for further emotional and/or financial support as they are within travelling distance of Kabul.”

15. Permission to appeal was granted by another judge of the Upper Tribunal on 8 August 2019 the operative part of the grant been in the following terms:

“3. The Judge found that Art 15(c) applied to the appellant’s home area in Afghanistan but, applying the CG decision in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC), he could reasonably be expected to relocate to Kabul. The Court Appeal has now overturned AS and it is being remitted to the UT to redetermine (see [2019] EWCA Civ 873). As a result, the Judge arguably erred in law in applying the legally flawed decision in AS. For the reason, permission to appeal is granted.”

Error of law

16. No legal error is made out in the manner in which the Judge considered the psychological therapists report. Adequate reasons have been given for the finding of the Judge regarding the weight to be given to this document.
17. In *AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118* the Upper Tribunal held that having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul. However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within that general position. A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.
18. The Court of Appeal in *AS (Afghanistan) v SSHD [2019] EWCA Civ 873* found that the Upper Tribunal erred in law in that its conclusion as to the percentage risk of being a victim of indiscriminate violence was not available to it on the evidence. Error was found on this limited basis and the case remitted on the basis the Upper Tribunal needed to consider only the extent of the risk to returned asylum seekers from security incidents. It was however, for the tribunal to consider in the light of the new UNHCR guidelines on returns, whether a more extensive basis for reconsideration was required.
19. An earlier decision of the Upper Tribunal in relation to which no statistical error has been shown to have arisen, which considered the correct 0.1% rate of civilian casualties, was *AK (Afghanistan) [2012] UKUT 163* in which the tribunal reconfirmed the adoption of an "inclusive approach" that is that in assessing whether levels of indiscriminate violence had reached the Article 15(c) threshold, all types of violence having a potential bearing were to be taken into account. They noted that whilst they must guard against working with a fixed equation in which targeted attacks were subtracted from the level of civilian casualties it was relevant to consider whether civilians were targeted on a wide scale, whether the violence was targeted to certain categories of civilian only and whether when particular categories of civilians were targeted there was heavy "collateral" damage (paras 162 to 164). When deciding that the overall Article 15(c) threshold was not reached they first considered the figure for civilian deaths and casualties in the context of the size of the overall population and noted that the total number of casualties for the year (hostages, wounded and dead) came to less than 0.1 percent of the population. Secondly although they said this had to be done with caution, they looked at figures for Somalia

and Iraq for comparison. Thirdly they noted that a significant number of acts of violence against civilians arose in the context of attacks targeting certain types of civilians without such attacks having routinely caused widespread harm to other unconnected civilians. They also considered state ineffectiveness, support from aid agencies and population displacement.

20. Mr Hussain submitted this decision had been overruled by the Upper Tribunal in *AS* but that is not correct as the head note in *AS* specifically stated. In *AK* it was not found by the Upper Tribunal, despite what appears to be accepted as the correct percentage rate of civilian casualties rising in Afghanistan, that the appellant in that case was able to succeed in a claim to entitlement to humanitarian protection pursuant to article 15(c) of the Qualification Directive.
21. The Qualification Directive (Council Directive 2004/83/EC) of 29 April 2004 is a directive on minimum standards for the qualification and status of third country nationals or stateless persons who qualify as refugees or as persons who otherwise need international protection and the content of the protection granted. Article 15 (c) refers to serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. This is replicated in immigration rule 339CA (iv).
22. It states:

“A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
- (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
- (iv) they are not excluded from a grant of humanitarian protection.

23. There have been a number of other cases in which it has been found that failed asylum seekers being returned to Kabul will face no real risk, without more. In *AK*, when assessing whether Kabul city was a viable internal relocation alternative, the Upper Tribunal found that in general, return to Kabul was safe and reasonable (paragraph 249B (iv)).
24. In *AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC)* handed down on 28 March 2018, the Upper Tribunal held, regarding internal relocation to Kabul, that: ‘Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout may other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate

to Kabul even if he does not have any specific connections or support network in Kabul. 'However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above. 'A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.' Although Kabul suffered the highest number of civilian casualties (in the latest UNAMA figures from 2017) and the number of security incidents is increasing, the proportion of the population directly affected by the security situation is tiny. The current security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh' [paras 241(ii-v)].

25. Whilst the UNHCR Guidelines referred to by the Court of Appeal post-date the promulgation of AS - where the evidence was dated up to December 2017 - the country information considered by both the UNHCR and the Upper Tribunal was broadly similar in range and calibre. The June 2019 European Asylum Support Office (EASO) Country Guidance Afghanistan made similar findings to AS. Having considered the general situation in relation to food security, shelter, hygiene and basic healthcare and subsistence, EASO noted that the general circumstances prevailing in Kabul (alongside Mazar-e-Sharif and Herat) did not preclude the reasonableness to settle there.
26. The Court of Appeal's judgement in AS was handed down on 24 May 2019. That Court allowed the appeal which is reported with neutral citation *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 873. Although the appeal before the Judge was heard on 2 May 2019 a judicial decision 'speaks' from the date it is handed down which, in this case, was on 6 June 2019 and therefore after the Court of Appeal's decision.
27. The Court of Appeal in AS held the Upper Tribunal made an error of law by concluding that the level of civilian deaths and injuries as proportion of the population of Kabul was less than 0.01%, whereas the correct percentage was 0.1%. The Court Of Appeal therefore allowed the appeal on that basis and ordered that the case be remitted back to the Upper Tribunal 'on the basis that it need reconsider its conclusions only (my emphasis) on the question of the extent of the risk to returned asylum-seekers from security incidents of the kind considered at paras. 190-9 of its Reasons' [para 80].
28. It is also important to note that the Court of Appeal considered the Upper Tribunal's approach to assessing the reasonableness of internal relocation at [72] and noted that, aside from the factual error as to the percentage of civilian casualties, there was no error of law in its approach [para 73]. It also earlier acknowledged that the Upper Tribunal's reasons are clear [12].
29. The UNHCR's approach to the reasonableness of internal relocation in the UNHCR Eligibility Guidelines is based on how the UNHCR considers the wider concept of internal relocation. The Court of Appeal in AS noted that the

- approach represented to it by the UNHCR was potentially discordant with that of the English courts (see paras 62-63).
30. It is also relevant to consider that the available country information continues to be consistent with, and supports the Upper Tribunal's assessment and observation, in *AK* and *AS* and that internal relocation to Kabul is generally likely to be reasonable, subject to consideration of whether there are particular factors relevant to the person's individual circumstances, for example, a single woman or female head of household, or other vulnerable persons, which might prevent them from internally relocating.
 31. In relation to the weight to be given to the UNHCR report, a number of domestic cases have been considered including *AZ (Ivory Coast) CG [2004] UKIAT 00170* the Tribunal noted UNHCR's view that the return of individuals from the Ivory Coast outside of Abidjan should be avoided, but took the view that UNHCR had a range of interests that went beyond the relatively narrow questions that Adjudicators and the Tribunal asked when determining whether returns would be contrary to the Human Rights Act 1998. The main reason for UNHCR's opinion appeared to be the avoidance of internal displacement. UNHCR opinions did not mean that conditions or security concerns about internal displacement in Abidjan were sufficiently severe to amount to a breach of Article 3. If UNHCR meant that, they would say so.
 32. In *YK (Serbia and Montenegro) [2004] UKIAT 00207* the appellant relied on a UNHCR position paper about the risk to Roma in Kosovo. The Tribunal said that UNHCR's position paper was a guide only and was not a substitute for making an assessment of the facts of an individual case.
 33. In *R (on the application of Mohn Golfa) [2005] EWHC 2282* Admin Mr Justice Moses said that it was not irrational for the Secretary of State for the Home Department not to follow UNHCR's recommendation against removals to Liberia. UNHCR should command respect and support but its policies were not co-extensive with those of individual states and it was laid from the terms of its reports that it did not confine consideration to persecution on the grounds specified in the Refugee Convention or whether removal would breach Article 3. The Secretary of State for the Home Department should take UNHCR recommendations into account but was not bound by them.
 34. In *HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC)* the Tribunal decided, though very considerable weight is almost always to be attached to UNHCR guidelines on risk categories in particular countries, it is not accepted that departure from the guidelines should only take place for a cogent and identified reason. Cases are to be decided on the basis of all the evidence and arguments presented to the Tribunal.
 35. In *HF (Iraq) and others v Secretary of State for the Home Department [2013] EWCA Civ 1276* the Claimant failed asylum seekers unsuccessfully challenged the most recent country guidance decisions relating to Iraq. The Court rejected an argument that there was justification for conferring a presumptively binding status on UNHCR reports merely because of their source. The Court had to assess all the evidence affording such weight to different pieces of evidence as it saw fit. It was said that UNHCR was responsible not merely for objectively

assessing risk but also for assisting returnees and the court was entitled to be alive to the possibility that the latter function might colour the risk assessment even if only subconsciously

36. It was not made out before the Judge that the appellant is a vulnerable individual and it was not made out that the appellant would face a risk of serious harm as a result of the security and humanitarian situation in Kabul or as a result of any practical difficulties the appellant may face living there, such as to warrant it being found in the Judge erred in law in concluding the appellant had not established it will be unreasonable or unduly harsh for him, as a single healthy male, to return to Kabul. It is not made out the view of the UNHCR is determinative in relation to this matter.

Decision

- 37. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

38. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 25 September 2019