



**Upper Tier Tribunal
(Immigration and Asylum Chamber)** Appeal Number: PA/04979/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 2 December 2019**

**Decision & Reasons
Promulgated
On 3 December 2019**

Before

Upper Tribunal Judge Pickup

Between

**AH
[Anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Ms M Butler, instructed by Duncan Lewis & Co
Solicitors

For the respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Malcolm promulgated 27.8.19, allowing on human rights grounds but dismissing on protection grounds, the appellant's

appeal against the decision of the Secretary of State, dated 19.4.19, to refuse his asylum claim.

2. First-tier Tribunal Judge Feeney granted permission to appeal on 22.10.19.
3. The grounds argue that the judge erred by following the overturned (remitted) Country Guidance of AS (Afghanistan) [2018] UKUT 118; not giving reasons for declining to depart from Country Guidance; failing to consider article 15(c); and failing to take into account findings that amounted to a finding of refugee status.
4. The respondent's Rule 24 response, dated 27.11.19, does not oppose the application for permission to appeal, accepting that "the findings of fact and consequent issue of internal relocation to Kabul are unclear and it was arguably erroneous for the FTTJ to rely on AS (Afghanistan) given the Court of Appeal's decision in the same case."
5. However, the respondent submits that the threshold for Article 15(c) risk in Kabul has not been reached and thus any failure to consider this was not material.
6. The respondent invited the Upper Tribunal to relist the matter for a CMR pending the decision of the Upper Tribunal following the rehearing of AS, which is awaited, on the basis that the Country Guidance will have direct relevance to the appeal.

Error of Law

7. For the reasons summarised below, I found errors of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade by allowing the appeal.
8. The previous First-tier Tribunal decision dismissed the appeal on the basis that it would be reasonable to expect the appellant to relocate to Kabul, where there would be a sufficiency of protection.
9. There was no issue of credibility in this appeal; the question was the risk of forcible recruitment to the Taliban and reasonableness of internal relocation to Kabul or Jalalabad, away from his home area of Nangahar.
10. Judge Malcolm made a number of positive findings in the appellant's favour:
 - (a) It was not in contention that the appellant's father was a member of the Taliban;
 - (b) The appellant had managed to escape Afghanistan with the assistance of his uncle;

- (c) Given that he has had no recent contact with him, the appellant would not have the support of his maternal uncle in relocating or resisting his father's advances to force him to join the Taliban;
 - (d) It is plausible that given his father's position in the Taliban he would want to take revenge for the appellant's resistance to recruitment and flight from Afghanistan, considering that his son had dishonoured him. It follows that there was a risk to him should he be located by his father;
 - (e) There would be difficulties for him in returning to his home area of Nangahar;
 - (f) The risk that the father would be able to locate him if he returned to Kabul cannot be discounted;
 - (g) He would not have any network of support in Kabul;
 - (h) Whilst internal relocation to Kabul is possible, the appellant may well be at enhanced risk due to his lack of any family network on which he could rely, the length of time which he has been absent from Afghanistan, lack of integration and any current ties to the country, and his familial association with the Taliban;
 - (i) The judge accepted the expert opinion that it is highly unlikely that the appellant would be able to integrate easily as he has no social or family structure, which are pivotal in obtaining employment;
 - (j) The judge also accepted the expert opinion that there was a strong likelihood that the appellant could be found even if he internally relocated to Kabul.
11. There is no merit in the ground that the judge did not address the issue raised in submissions of article 15(c) risk in the appellant's home area of Nangarhar. Having accepted that he would be at risk on return to his home area, the judge concluded that a return there was not an option. In the circumstances, it was unnecessary to consider the article 15(c) risk there specifically.
12. However, considering herself bound by the Country Guidance of the Upper Tribunal in AS (Afghanistan) [2018] UKUT 118, the judge found that the appellant did not fall within any of the stated categories of persons who would be at real risk of persecution from the Taliban in Kabul. The claim that he would be additional risk because of mental health problems was rejected. It was on that basis that the protection claim was rejected.
13. Nevertheless, the judge went on to consider paragraph 276ADE(i)(vi) and, noting that he has been absent from Afghanistan since 2012, having arrived in the UK at the age of 15, found that a large part of

his formative years have been spent in the UK. Given the factors set out above, the judge concluded that there would be “additional difficulties for him in re-integrating into life in Afghanistan.” The judge concluded that the particular difficulties which the appellant would face on return to Afghanistan met the test of very significant obstacles to integration. The judge also found that removal would be disproportionate. The judge, therefore, allowed the appeal on human rights grounds and, implicitly, dismissed it on protection grounds.

14. It had been submitted to the First-tier Tribunal that AS was no longer valid Country Guidance, it having been remitted to the Upper Tribunal. Reliance was placed by the appellant’s representative on the UNHCR guidelines which conclude that internal relocation to Kabul is presently unavailable and unreasonable for anyone. However, notwithstanding that AS had been overturned by the Court of Appeal, the judge gave no reasons for declining to depart from AS and purportedly applied its Country Guidance, stating only at [106] of the decision, “I require to observe the Country Guidance Cases.”
15. Ms Butler’s submission is that but for the judge considering herself bound by AS, the findings would or should have led to the appeal being allowed.
16. Mr Kotas submitted that the First-tier Tribunal decision is unclear and does not indicate that but for AS, the appeal would have been allowed. He stated that it was unclear what the judge actually found and not clear whether the appeal could have been allowed on protection grounds of a risk on relocation to Kabul. For example, at [97] the judge did not accept that the evidence supported a finding that the appellant has a fragile mental state. Mr Kotas also submitted that if the judge had considered herself bound by AS, she could not have read it as it held that there was no likelihood that the Taliban can trace a person to Kabul.
17. I am satisfied, and as the respondent has conceded, it was an error of law for the judge to rely on AS to dismiss the appeal. AS was overturned by the Court of Appeal in AS (Afghanistan) v SSHD [2019] EWCA Civ 873, so that the Upper Tribunal’s decision was no longer binding. It was an error of law for the judge to consider herself bound by it. Instead, the judge should have, and largely did, make an assessment of all the relevant evidence and facts to determine whether there was a real risk of persecution, or alternatively serious harm, on return to Afghanistan and in particular relocation to Kabul.
18. The respondent has advanced no case to undermine the positive findings made by the judge, as set out above. In the circumstances, I am satisfied that having accepted that there was a real risk of the appellant being located by his father in Kabul and that if found he would be at risk from his father, together with all the additional difficulties of relocating to Kabul identified by the expert opinion,

which at [109] of the decision the judge also accepted, it cannot be the case that there was a viable option to internally relocate to Kabul. These findings are outside the issue of being traced by the Taliban per se or any more general article 15(c) risk.

19. The judge accepted and made findings that lead to the inevitable conclusion that the appellant could neither safely return to his home area nor relocate to Kabul because of the risks from his father, the absence of any support, all the other difficulties identified by the expert, and his long absence from Afghanistan since the age of 15. Even if the judge was right to apply the Country Guidance of AS, it is difficult to see how and why the appeal was dismissed on international protection grounds.
20. I am satisfied that with or without AS, the positive findings made in the appellant's favour should have led to one conclusion only, that relocation to Kabul would be unduly harsh, so that he is entitled to international protection.
21. It follows that there is no point in the respondent's suggestion of waiting for the outcome of the Upper Tribunal's new decision in AS.

Decision

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it



Signed

Upper Tribunal Judge Pickup

Dated

2 December 2019