



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08761/2017

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 24 July 2020

Decision & Reasons Promulgated
On 10 August 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EHSANULLAH UMARZI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the respondent: Mr S Bass, Caseworker at Duncan Lewis Solicitors

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. The Secretary of State for the Home Department (appellant) appeals against the decision of Judge of the First-tier Tribunal S Aziz (the judge) who, in a decision promulgated on 1 November 2017, allowed the appeal of Mr Ehsanullah

Umarzi (the respondent) against the respondent's decision of 31 August 2017 to refuse his protection and human rights claim following the making of a deportation order on 30 August 2017.

Background

2. The respondent is a national of Afghanistan hailing from Tagab District in Kapisa Province. His date of birth is given as 1 January 1993. He has a mother and sister who remain in Afghanistan. He entered the UK on 4 March 2008 as a 15-year-old and claimed asylum on the same day. The respondent claimed his father had been killed by the Taliban who believed he was an American spy, and that the Taliban were now targeting him based on an imputed political opinion stemming from the familial relationship. The respondent also claimed to face a real risk of persecution from the Afghan authorities based on his father's involvement with the Communist PDPA government. The appellant refused the asylum application but granted the respondent Discretionary Leave until 30 June 2010. The respondent made an in-time application for Further Leave to Remain but this was refused on 24 November 2010 and an appeal dismissed on 17 January 2011 by Judge of the First-tier Tribunal Jones. Judge Jones found the respondent to have given an incredible account of his claimed fear of ill-treatment from the Taliban and the Afghan authorities.
3. The respondent asserts that he travelled to France in late 2014 or early 2015. He was arrested on 9 November 2016 whilst attempting to enter the UK from France using the identity document of another person. On 8 December 2016 he was convicted of possession/control of identity documents with the intention of gaining access illegally to the UK. He was sentenced to 12 months imprisonment. In response to a Notice of Decision to make a Deportation Order the respondent claimed his life would be in danger in Afghanistan on essentially the same factual basis as his earlier asylum application. In refusing the respondent's new asylum claim on 31 August 2017 the appellant considered there were no reasons from departing from the findings of Judge Jones, that the respondent could relocate to Kabul, and that there was no real risk of serious harm to him pursuant to Article 3 ECHR or under article 15(c) of the Qualification Directive such as to entitle him to a grant of Humanitarian Protection.

The decision of the First-tier Tribunal

4. The respondent advanced 3 separate grounds at his appeal hearing. He maintained that he had a well-founded fear from the Taliban due to his father's political activities, and that the humanitarian situation had deteriorated since the publication of **AK (Article 15(c)) Afghanistan CG** [2012] UKUT 00163 (IAC) such that he was now entitled to a grant of Humanitarian Protection. His third ground was that he would be targeted on return to Afghanistan because he would be seen as being 'Westernised'.

5. The judge heard oral evidence from the respondent through a Pashtu interpreter, although the respondent was able to speak English and saw himself as being fluent. In cross-examination the respondent claimed that the way in which he spoke had changed and that this would bring him to the attention of people in Afghanistan. He now used English words when speaking Pashtu and it would be apparent to anyone in Afghanistan that he had lived in the West. The respondent also claimed to be Westernised in his dress sense. Even if he could wear Afghan clothing it would still be obvious from the way that he spoke that he was from the West. His behaviour and mannerisms had also changed. He claimed it was normal within Afghan culture for 2 men who hold hands whilst speaking and if he failed to do this he would be seen as being different. Although he was a Sunni Muslim the respondent did not practice his religion very much and this would be an issue for people in Afghanistan
6. The judge was not satisfied that the respondent's claimed fear of the Taliban was materially different from the account previously rejected by Judge Jones, or that there was sufficient evidence to entitle him to depart from the Country Guidance case in **AK**. I need say no more about these findings as they have not been the subject of a cross appeal.
7. The judge did however find that the respondent would be perceived as being Westernised if returned to Kabul and that this would expose him to a real risk of persecutory treatment. The judge's findings in relation to the respondent's perceived Westernisation are contained at [66] to [71]. At [66] the judge noted that the respondent entered the UK as a 15-year-old and that, other than a period of upwards of 2 years spent in France, he had resided in the UK for some of his childhood and the entirety of his adult life. The judge noted that the respondent spent some of the most formative years of his life in the West. The judge stated,

"It is reasonable to assume that given the age at which he entered the United Kingdom and having lived in the West for such a lengthy period, that he would have picked up many aspects of Western culture. Likewise, it is reasonable to conclude that his absence from Afghanistan for such a lengthy period and the fact that he left the country when he was a minor would result in him losing or being unfamiliar with some cultural traits/norms within Afghan culture and society."
8. At [67] the judge accepted that the respondent was able to speak English although he found that the respondent had exaggerated his claim that he would find it difficult to speak Pashtu if returned to Afghanistan. At [68] the judge stated,

"Nevertheless, I do accept his evidence that having lived in the United Kingdom for such a lengthy period, that he has begun to incorporate the occasional English word while speaking Pashto and that this will be picked up by the native Pashto speaker in Afghanistan. I find this to be much more of a relevant factor than the [respondent's] example of someone who will be noticed as being from the West because he will not hold hands with

another man, as is common in Afghanistan. I do not accept the [respondent's] evidence that on every or most occasions that men in Afghanistan meet, that they will hold hands when speaking to each other."

9. At [69] the judge accepted the respondent's evidence that since arriving 2008 he had adopted a Western dress code. Relying upon the principles established in **HJ (Iran) v SSHD** [2007] EWCA Civ 1024 (and indeed reinforced in **RT (Zimbabwe) and others (Respondents) v SSHD (Appellant)** [2012] UKSC 38) the judge expressed some discomfort from the Presenting Officer's argument that the respondent could avoid being perceived as being Westernised by modifying his behaviour and wearing traditional Afghan attire. Although the judge indicated that he was not suggesting there was a parity between an individual's sexual orientation and dress code, he was uncomfortable with the argument that the respondent should change an aspect of his lifestyle in order to avoid falling into a category of a person who is potentially at risk of adverse attention.
10. At [70] the judge accepted the respondent's evidence that he was a 'lapsed Muslim'. The judge was "not quite" persuaded that being a non-practising would now bring the respondent to any adverse attention in Kabul, but he accepted that the argument could be made that this was one additional factor increasing the respondent's risk of being seen as someone who had become Westernised.
11. At [71] the judge drew together all his findings and concluded that the respondent would be perceived as being Westernised by virtue of,
 - "a) his length of residence in the West, b) the adoption of a number of aspects of Western culture such as Western dress-wear and the occasional use of English words when speaking Pashtu, c) the fact that he is a lapsed Muslim, who only occasionally practices religion and d) the fact that he may well show ignorance of Afghan culture having been away from the country for such a lengthy period and having never resided there since he was a child."
12. At [72] the judge then considered whether the respondent's fear was objectively well-founded. He referred to section 8.9.1 of 'Country Policy and Information Note Afghanistan: Fear of anti-government elements (AGE's) - December 2016.' This referenced the UNHCR Eligibility Guidelines of April 2016, which indicated that:
 - 'AGEs reportedly target individuals who are perceived to have adopted values and/or appearances associated with Western countries, due to their imputed support for the Government and the international community. There are reports of individuals who returned from Western countries having been tortured or killed by AGEs on the grounds that they had become "foreigners" or that they were spies for a Western country.'
13. Based on the Eligibility Guidelines the judge found that anti-government elements in Afghanistan targeted individuals who were perceived as having

adopted values/appearances associated with Western countries and that such individuals were perceived to be supportive of the Afghan government and the international community. The judge stated,

“Furthermore, the UNHCR has confirmed reports of individuals having returned from Western countries who have gone to be tortured and killed by anti-government elements on the grounds that they had become foreigners or spies for a Western country due to the fact that they were perceived as ‘Westernised’.”

14. In light of his finding that the respondent would be perceived as being Westernised, and applying the lower standard of proof, the judge concluded that the appellant would be at real risk of persecution and/or that he was entitled to Humanitarian Protection as his removal would constitute a real risk of a breach of Article 3 ECHR.

The challenge to the judge’s decision

15. The appellant lodged an in-time application for permission to appeal. The application was unfortunately not processed by the First-tier Tribunal until around November 2019. In a decision dated 7 November 2019 Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, granted permission to appeal.
16. The grounds, amplified in the skeleton argument of Mr C Howells, Senior Presenting Officer, dated 13 January 2020, and in the oral submissions of Mr Melvin, contend that the judge “attributed significant weight” to the UNHCR Eligibility Guidelines but that the UNHCR applied a lower threshold than that required by the Tribunal. The judge had been selective; he should have referred to paragraphs 8.9.2 and 8.9.3 of the UNHCR Eligibility Guidelines and his failure to do so meant that he failed to resolve the “potential conflict between the different sections of the same document as to why more weight should be afforded to paragraph 8.9.1.” The respondent’s fear of ill-treatment based on his perceived Westernisation was not well-founded and the judge was not entitled to find that it was.
17. Paragraphs 8.9.2 and 8.9.3 of the Eligibility Guidelines reads as follows:

‘8.9.2 In its assessment of the treatment of returnees, DFAT noted in its February 2016 report that:

‘Returnees from western countries are almost exclusively returned to Kabul. While some families are returned, most returnees tend to be single men travelling alone. While men of working age are more likely to be able to return and reintegrate successfully than unaccompanied women and children, the lack of family networks for single men can also impact on their ability to reintegrate into Afghan community. The relatively better economic opportunities available mean returnees often choose to remain in Kabul. There are no tracking mechanisms for these returnees, so it is difficult to assess the conditions they face. There are plausible, but anecdotal, reports of returnees from western countries turning up in drug communities. DFAT assesses that, because of Kabul’s size and diversity,

returnees would be unlikely to be discriminated against or subject to violence on the basis of ethnicity or religion.'

8.9.3 DFAT also noted in its 2015 report that it was:

'... aware of occasional reports of returnees from western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent time in a western country. While this Country Information Report does not make a judgement on the veracity of individual cases, in general DFAT assesses that returnees from western countries are not specifically targeted on the basis of their being failed asylum-seekers. ... people who are identifiable as being associated with foreign (particularly western) countries may be targeted by insurgent groups such as the Taliban. Returnees from western countries, however, face a similar level of risk to other people in Afghanistan who are associated with support for the government or the international community. People in this situation often take measures to conceal their association, such as not travelling with documents or symbols that may link them to the Afghan government, the international community based in Afghanistan or western countries. DFAT assesses that returnees from western countries who maintain a low profile such as by taking steps to conceal their association with the country from which they have returned do not face a significantly higher risk of violence or discrimination than do other people in Afghanistan with a similar ethnic and religious profile.'

18. The respondent would be returned as an ordinary civilian and that there was no determinative evidence that he would be at risk due to his claimed Westernisation. Reliance was placed in Mr Howell's skeleton argument and in Mr Melvin's submissions on the findings of the Upper Tribunal in **AS (Safety of Kabul) Afghanistan CG** [2018] UKUT 00118 (IAC) promulgated after the judge's decision, and in particular at [90] to [[94] and [187], where the Upper Tribunal considered an EASO Country of Origin Information Report dated December 2017 and evidence from Dr L Shuster and concluded that a person on return to Kabul would not be at risk on the basis of Westernisation.
19. The grounds additionally took issue with the judge's finding that the respondent may be identified as being Westernised. The respondent's use of occasional English words whilst speaking Pashtu was said to be speculative and had no basis in fact. The manner in which the respondent dressed was a matter for him and would largely depend on what was available in Kabul, and he would be able to reduce any perceived risk by moderating his clothing. The judge found that being a non-practising Muslim would not bring the respondent to any adverse attention in Kabul and so was not in reality a factor that needed consideration. The judge also made no findings on the assistance the respondent's family could provide in helping him readjust to life in Afghanistan.

Discussion

20. I will first consider the challenge to the judge's factual conclusion that the respondent was at real risk of being identified as being Westernised. In making his factual findings the judge properly directed himself in relation to the burden

of proof and the lower standard of proof [53] having observed the respondent giving evidence in both examination-in-chief and cross-examination.

21. There has been no specific challenge to the judge's finding that, as the respondent lived some of the formative years of his life in the West as well as his adult life, he "... would have picked up many aspects of Western culture", and that his departure from Afghanistan when a minor "... would result in him losing or being unfamiliar with some cultural traits/norms within Afghan culture and society" ([66], [70]). The judge was plainly entitled to this finding for the reasons given. I reject the appellant's assertion that the judge's finding that the respondent used English words whilst speaking Pashtu had no basis in fact. The judge's finding was based on the respondent's own evidence which the judge carefully evaluated, and which he considered in the context of the respondent having lived outside Afghanistan for almost 10 years at the date of the decision. This is not a situation where the judge blindly accepted assertions made by the respondent. For example, the judge rejected the respondent's claim that he had been targeted by the Taliban and the Afghan authorities, and he found that the respondent embellished other aspects of his evidence, most notably the respondent's claim that he would find it difficult to speak Pashtu if returned to Afghanistan [67]. The judge's finding at [68] was one rationally open to him on the evidence considered and for the reasons he gave.
22. At [69] the judge was correct in observing that there was no parity between an individual's sexual orientation and dress code. A modification of a person's clothing in order to avoid drawing adverse attention, in the absence of compelling evidence, does not fall within the ambit of any of the Refugee Convention reasons. The judge was nevertheless entitled to take into account, as a potential factor increasing the risk that the respondent would be perceived as being Westernised, his adoption of a Western dress code and his desire to wear Western clothes. Whilst the judge was "not quite persuaded" that being a non-practising Muslim would bring the respondent to any adverse attention in Kabul, he did find, at [70] and [71], that being a lapsed Muslim was nevertheless a factor, in combination with the other factors identified, that may, cumulatively, give rise to a perception that the respondent was Westernised. This was a conclusion reasonably open to the judge. Being seen as somebody who only rarely practiced his religion may not, of itself, give rise to a risk of ill-treatment, but when considered with other factors such as the respondent's incorporation of English words in his conversational Pashtu and his unfamiliarity with Afghan culture and customs, it was sufficient to entitle the judge to reach the finding that the respondent's lack of religious observation was nevertheless relevant when considering whether he would be perceived as being Westernised.
23. The grounds contend that the judge failed to take into account the assistance that could be provided by the respondent's family who still lived in Afghanistan in helping him to readjust to life in that country. Any such assistance would however have little bearing, at least in the short to mid-term,

on the perception that other people may have of the respondent based on his conduct, his mode of speaking and his appearance. Any assistance that could eventually be provided by the respondent's family to help him readjust to life in Afghanistan would therefore be of very limited value when determining whether, when he was returned, he would be at real risk of being perceived as being Westernised.

24. The judge's factual conclusions were reached after a detailed consideration of the evidence and was based on a holistic assessment of several material factors. It cannot be said that his conclusions were not rationally open to him on the evidence that he considered and for the reasons that he gave.
25. I will now consider whether, having found that the judge was entitled to conclude that the respondent was at real risk of being perceived to be Westernised, he was then entitled to conclude that the respondent would be at real risk of serious ill-treatment because of his perceived Westernisation. In determining whether the judge's decision involved the making of an error on a point of law I must consider the evidence that was before the judge when he made his decision. In this regard, the subsequent findings of the Upper Tribunal in **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)** have limited relevance. The Upper Tribunal's assessment at [90] to [94], and its conclusion at [187], was based on evidence (the EASO Country of Origin Information Report of December 2017 and the written and oral evidence of Dr Shuster) that was not before the judge, and could not reasonably have been before him given the date of the EASO report and given that Dr Shuster's evidence was created for the Country Guidance case.
26. The judge's assessment was based on an extract from the UNHCR Eligibility Guidelines of April 2016 set out at 8.9.1 of the CPIN report dated December 2016. The extract, the material part of which is set out at [12] above, referred to reports of individuals who returned from Western countries who were tortured or killed on the grounds that they had become 'foreigners' or because they were perceived as being spies for a Western country, and that individuals who were perceived as having adopted values or appearances associated with Western countries had been reportedly targeted by anti-government elements due to their imputed support for the government and the international community. The source of the extract, the UNHCR Eligibility Guidelines, will typically command considerable weight because of the organisation's expertise and its reputation for independence, reliability and objectivity, although the weight that is ultimately accorded to its guidelines will depend on the intrinsic quality of the particular guidelines (see **AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC)**, at [176]). I am satisfied that the judge was entitled to attach weight to the extract at 8.9.1 of the appellant's own CPIN report and that it established a legitimate basis for his conclusion that, on the lower standard of proof, there was a real risk that the respondent would be targeted by anti-governmental elements because of his perceived Westernisation.

27. The grounds contend that the judge failed to consider 8.9.2 and 8.9.3 of the same CPIN and that in so doing he failed to resolve a “potential conflict” between the sections in respect of the targeting of those perceived to be Westernised. I have considered 8.9.2 and 8.9.3, which are set out above at [17], in some detail. 8.9.2 and 8.9.3 contain two extracts from a February 2016 report by DFAT (the Australian government’s Department of Foreign Affairs and Trade). The extract at 8.9.2 refers to returnees from Western countries to Kabul, particularly single men, and the conditions they face. It assesses that, because of Kabul’s size and diversity, returnees would be unlikely to be discriminated against or subjected to violence on the basis of ethnicity or religion. This does not speak to the issue of perceived Westernisation. It does not undermine the indication of the UNHCR at 8.9.1.
28. The extract at 8.9.3 indicates that DFAT is aware of occasional reports of returnees from Western countries alleging they have been kidnapped or otherwise targeted on the basis of having spent some time in the West. DFAT then assesses that returnees from Western countries are not specifically targeted on the basis of being failed asylum-seekers. There is however a distinction between a person being targeted, on the one hand, on the basis that they are a failed asylum-seeker, and on the one hand, on the basis that they are perceived as being Westernised. A failed asylum-seeker from a Western country may not exhibit any conduct or behaviour that would associate that person with the West. This is recognised in the DFAT extract itself. Immediately after the assessment relating to failed asylum-seekers, DFAT states that people who are identifiable as being associated with Western countries may be targeted by insurgent groups such as the Taliban. Although DFAT concludes that returnees from Western countries face a similar level of risk to other people in Afghanistan who are associated with support for the government or the international community, and that those who maintain a low profile by concealing their association with the Western country do not face a significantly higher risk of violence than other people in Afghanistan with a similar ethnic and religious profile, this does not take into account those who may be unable to conceal their associate because of the way they speak, their use, such as the respondent, of English words when speaking Pashtu, and their unfamiliarity with cultural and societal norms. I do not consequently find that 8.9.2 and 8.9.3 are in conflict with 8.9.1, or that they judge’s failure to expressly refer to 8.9.2 and 8.9.3 undermines the sustainability of his reliance on the UNHCR Eligibility Guidelines, or the sustainability of his conclusion that the appellant would face a real risk of serious ill-treatment based on his perceived Westernisation. I am consequently satisfied that the judge’s decision, based on the evidence that was before him at the time, does not contain an error on a point of law.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law. The Secretary of State for the Home Department's appeal is dismissed.

D. Blum

Signed

Upper Tribunal Judge Blum

Date: 3/8/2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email