



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001659
First-tier Tribunal No:
PA/50069/2020
LP/00091/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Mr S K
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Galliver-Andrew (Counsel)

For the Respondent: Mr Tony Melvin (Senior Home Office Presenting Officer)

Heard at Field House on 18 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L. U. Chinweze promulgated on 24th June 2021, following a hearing at Taylor House on 26th April 2021. In the determination, the judge dismissed the appeal of the

Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to the appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan, who was born on 4th March 1961. He appealed against the decision of the Respondent dated 17th January 2020 refusing his claim for asylum, humanitarian protection, and for leave to remain in the United Kingdom on family and private life grounds.

The Appellant's Claim

3. The essence of the Appellant's claim is that he was born in Jalalabad, in the Nangarhar Province in Afghanistan. He joined the Hizb-e-Islami and fought to the Russians during their occupation of Afghanistan, losing three fingers in military action. When the Taliban came to power, they persecuted members of other political parties, which included the Hizb-e-Islami. The Appellant was detained and tortured by the Taliban. His brother then managed to secure his release by paying a bribe a month later. The Appellant moved to a different area of Afghanistan and kept a low profile. In 2001 the Northern Alliance came to power and the Appellant began to experience problems with them as well because of his involvement with the Hizb-e-Islami. The Appellant's father then procured an agent's help to enable him to travel to Pakistan where he stayed for 45 days before coming to the UK. In 2003 his asylum appeal was dismissed.
4. In 2008 he made a fresh claim application. This was refused in 2012 and 2017. He was removed to Pakistan, but on arrival the Afghan authorities refused to accept his nationality as his only documentation was a false Pakistani identity card and he as then returned back to the UK. The Appellant was released from immigration detention in February 2018 in the UK. In 2019 he made further submissions and this time accepted that the accounts that he had given in 2002 and 2008 that he had been a member of the Hizb-e-Islami fighting the Russians were false accounts. He claimed that the agent had advised him to make such claims. This is because Afghanistan was a very difficult place for the Appellant to be in. He suffered poverty. When he was around 10 years of age he and his family migrated to Peshawar in Pakistan. Life in Pakistan as also just as difficult as he did not have any papers. He procured jobs in labouring, carpentry, and selling vegetables to bring in income. It was there he lost his fingers in a carpentry accident and not whilst fighting the Russians as he had previously claimed. In Peshawar the Appellant married in 1987 and has five children.
5. The Appellant claimed to suffer persecution from the Pakistani authorities. The police regularly stopped him and harassed him and asked for his papers. He was beaten with the butt of a gun. He was detained. His wife passed away three years ago but his children still live there. His father-in-law then helped him to leave Pakistan and gave him money to find an agent. The Appellant had come to the UK to claim asylum and to find work here. In 2002 he formed a relationship with a Ms Aurelia Lumbré, a Filipino national who had indefinite leave to remain in the UK. She was separated from her husband but has not been divorced due to their Catholic religion.
6. The Appellant is now dependent on his partner and it would be very difficult for him to carry on their relationship through modern means of communication. The Appellant suffers from chronic joint pain and depression. He has never been to

Kabul and cannot be relocated there after 45 years. He does not know anyone in Kabul. He has no support network there. He would have no access to medication there. On the other hand, he could not be returned to Pakistan either, and he would face beatings and detention there once again, and Afghans are routinely now deported back from Pakistan to Kabul. In Afghanistan he would be at risk of persecution.

The Judge's Findings

7. With respect to the Appellant's asylum claim, the judge observed that, "The appellant claims to have a well- founded fear that he will be persecuted on the basis that he will be perceived as being *westernised* on his return to Afghanistan and because of his physical and mental health", (paragraph 57). The judge rejected this. He also added that, "Afghans perceived as westernised are not considered to form a particular social group for the purposes of the Convention as they do not share an immutable or innate characteristic that cannot be changed ..." (paragraph 61). The judge observed that the Appellant had not produced any evidence to counter the country evidence in relation to this issue and nor had he prided any written or oral evidence that show that he would stand out or be targeted on his return to Afghanistan (paragraph 62).
8. Therefore, the Appellant's claim that he would be persecuted as being westernised was not well-founded (paragraph 63). The claim that he would be perceived as a member of a particular social group was also rejected (paragraph 64). In concluding that the Appellant had no sustainable claim for protection, the judge observed that, "Given the appellant is in his early 60s, the ailments he has would be common among Afghani men of a similar age", and that "I do not accept the appellant's disabilities such as they are, give rise to a well- founded fear of persecution, nor do I accept that he will be subjected to inhuman or degrading treatment" (at paragraph 70).
9. The judge found that it was one thing for the Appellant to be returned to Afghanistan, but quite another for him to be returned there with his partner, Ms Aurelia Lumbré, a Catholic woman who was a citizen of the Philippines. As he explained, "I am satisfied that the appellant and his partner would face insurmountable obstacles continuing their family life in Afghanistan" (paragraph 109). He noted how the Upper Tribunal had decided in **AS (Safety of Kabul) [2020] UKUT 130 (IAC)** that "it would generally be reasonable for a single man with no family responsibilities to return to Kabul", but that in this case, "the appellant would be returning to Kabul with a partner who has never been to Afghanistan , who cannot speak the language and is unfamiliar with the culture" (paragraph 110). He also found that "It would be very difficult for Ms Lumbré to find work in Afghanistan given she is in her early 60s and the lack of opportunities for manual work like cleaning".
10. As for the Appellant himself, the judge referred to the expert report of Dr Antonio Guistozzi who had observed that, "as a 60 year old male who is partially disabled the Appellant would not be able to command the average daily rate for employment" so that, in "In these circumstances the Appellant would have difficulty maintaining and accommodating himself and his partner, so that this was a case where "the couple would face insurmountable obstacles to carrying on their family life in Afghanistan" (at paragraph 111).
11. The Appellant and his partner could, however, carry on their family life in the Philippines, as, "I was not presented with any evidence of the difficulties the

couple would face”, and that “the appellant admitted he had not made any enquires of the Philippine authorities as to whether he would be granted a visa to live with Ms Lumbre” (at paragraph 112) in that country. Nor was there any evidence before the judge that the Appellant and Ms Lumbre would not be able to access work opportunities there. In fact, Ms Lumbre had a family network in the Philippines “as she has grown up children she is in regular contact with”, and that “She visits the country every four to five years” (at paragraph 112). The appeal was dismissed.

Grounds of Application

12. The grounds of application state that the Tribunal erred in failing to take a holistic approach to the assessment of whether the Appellant could be returned to Afghanistan or whether or not it would be unduly harsh for the Appellant to internally relocate to Kabul. Dr Guistozzi had made it quite clear in his expert report that the Appellant could not be returned to his home region of Nangahar but that there was no mention of this evidence in the Tribunal’s determination. Instead, the judge had gone on to consider the possibility of internal relocation to Kabul. The Appellant had been outside of Afghanistan for at least nineteen years, and had been away for 45 years and was now in his 60s and suffering from disability and ill-health and the fact that he had an absence of support networks were material factors which should have weighed in any assessment of undue harshness with respect to his return to Afghanistan.
13. The Appellant’s family members were in Pakistan, not Afghanistan, and he could not return to live with them because he has no right to live in Pakistan. The judge had approached the country guidance in a manner which was compartmentalised. A standalone Article 3 medical ground argument was never pleaded by the Appellant. Nor was it the case that it was pleaded that he was a member of a particular social group at risk of persecution because he had a disability, and nor was it said that he would be at risk on the basis that he had been westernised. Yet, in taking such an approach, the judge had failed to consider the significance of health in the context of *unreasonable harshness* in accordance with the country guidance, which made it clear that this would be a material consideration in an individualised assessment.
14. With respect to the Appellant’s family life with Ms Aurelia Lumbre, the judge had found both the Appellant and his partner to be credible witnesses and to be in a genuine relationship. The judge had also accepted that the Appellant’s husband was a Catholic just as she was, and that due to their religion divorce would be difficult, whilst noting that she and the Appellant were in a genuine and subsisting relationship, which was not the case between the Appellant and her husband (at paragraph 102).
15. The Appellant’s partner gave evidence that she was separated from her husband but could not divorce. She gave evidence that if she and the Appellant sought to return to the Philippines they would be going to a country where divorce is prohibited, and where Ms Aurelia Lumbre had a long-term partner of a different religion, so that there could be no guarantee that the Appellant would be allowed entry. Moreover, given that divorce is prohibited, there was the argument that they would not be able to continue their relationship freely and openly. In the meantime they would also have lost all their UK connections, work and relationship that they had developed over the past nineteen years. These were insurmountable obstacles to the continuation of their family life.

16. On 26th August 2021 permission to appeal was granted by the First-tier Tribunal.

Submissions

17. At the hearing before me on 18th August 2023, Mr Galliver-Andrew submitted that after the Appellant's previous claim failed with the refusal of asylum being dismissed on 16th May 2003, the Respondent sought to remove the Appellant back to Afghanistan in 2017, but that the Afghan authorities refused to accept him, so that four days later he was flown back to London and detained. The Appellant, who has been cohabiting with his partner, Aurelia Lumbre, then lodged a fresh claim on 6th November 2019, and in his witness statement of 4th November 2019, acknowledged that the basis of his previous asylum claim was untrue.
18. However, he has not been back in Afghanistan for nearly five decades, his family having migrated to Pakistan, and that he would face a risk in Nangahar owing to its status as being one of the most dangerous provinces in the country, and that he could also not relocate reasonably to Kabul owing to a lack of support there and the accompanying health problems that he suffers from. Since the decision appealed against there have been very significant developments in Afghanistan in any event. The Appellant had advanced five grounds in defence of his claim (see the skeleton argument at paragraph 12), and the judge did not apply the country expert report at all in the decision.
19. Moreover the analysis of internal relocation is flawed because the Appellant has been away from Afghanistan for at least 43 years, and the sheer passage of time detracts from the ability of a 59 year old man with disabilities, from being able to return and reintegrate into Afghan society.
20. As for the Appellant's Article 8 rights to family life, it has been accepted that he is in a genuine and subsisting relationship with Ms Aurelia Lumbre, a Catholic woman, who is a national of the Philippines. She explained to the Tribunal why she could not continue with the family life in the Philippines because she would not be permitted to divorce her existing husband from whom she is estranged because divorce is not available for a devout Catholic, which in turn would impact upon her ability to live with the Appellant in the Philippines.
21. Finally, in her Rule 24 response in 2023, the Respondent has not considered the current situation in Afghanistan, despite being repeatedly requested to do so. Mr Galliver-Andrew submitted that given the length of time that has already gone by, the Tribunal should not make a finding not only of an error of law but proceed to determine this appeal on the basis of such findings of fact that had already positively been made in favour of the Appellant by Judge L. U. Chinweze.
22. For his part, Mr Melvin relied upon the Rule 24 response of June 2023. He opposed the appeal. He submitted that it was not true that the judge below had compartmentalised the consideration of issues before him. The Appellant's claim was one of generalised fear in Nangahar and this did not relate to any specific threat from the Taliban as such. He could return.
23. In reply, Mr Galliver-Andrew submitted that there was first, expert evidence before the judge which was not engaged with; second that the Appellant could not go to Pakistan as he was not a national of Pakistan; third, that the findings of fact are sufficient for this appeal to be allowed even on the 2020 guidance provided in **AS (Safety of Kabul) [2020] UKUT 130 (IAC)**. The Appellant is

now 59 years of age and he has already waited two years, and if this matter were to be remitted back to the First-tier Tribunal there would be unnecessary further delay, when the appeal can be decided by this Tribunal. He urged the Tribunal to so do.

Error of Law

24. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows. First, the Appellant tendered the country expert report from Dr Antonio Guistozi, where he explains the risk to the Appellant were he to be returned to his home region of Nangahar, but this is not referred to in the determination. Instead, the focus is upon internal relocation to Kabul. No consideration was given to the risk to the Appellant were he to travel by road from Kabul to Nangahar. In respect of indiscriminate violence in a region which is highly volatile and strongly controlled by militants.
25. Second, the country guidance case of **AS (Safety of Kabul) [2020] UKUT 130** requires the decision maker to make an individualised assessment of risk in Kabul. The fact that the Appellant, a person in his advanced years who has never lived in Kabul, and has not been in Afghanistan for 45 years suffering from a disability, may encounter a return that was unduly harsh, has not in these terms been considered.
26. Third, in relation to the Appellant's family life with Ms Aurelia Lumbre, given that the judge had accepted that there was a genuine and subsisting relationship between the two of them, the fact that as a Catholic his partner would not be able to divorce her husband in the Philippines, nor as a Catholic be able to go to Afghanistan with the Appellant in safety was not considered.

Re-Making the Decision

27. I have re-made 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 for the following reasons.
28. First, the Appellant cannot be returned to Afghanistan. A previous attempt to do so in 2017 led to his being returned back to the UK four days later. In the alternative, even if he could be returned the country expert report of Dr Antonio Guistozi of July 2019 was clear that "There has been an increase in terrorist attacks" and that "the Taliban are in control of large parts of several districts in Nangahar province". The judge referred to this (at paragraph 72). A second report by Dr Guistozi of 7th August 2020 considered the reasonableness of internal relocation to Kabul in the light of the guidance in **AS** and he was clear that "the situation in Kabul has worsened due to the COVID 19 pandemic, as it has made employment opportunities more difficult and depressed wages" (paragraph 73). On the basis of an individualised assessment of risk, I find that the Appellant, as a person of advanced years who has never lived in Kabul and has been absent from Afghanistan for 45 years, who is partially disabled, it would not be possible for him to relocate in a way that would allow him to command the average daily rate for employment (see paragraph 111).
29. Second, the appeal falls to be allowed on the basis of the Appellant's family life with Ms Aurelia Lumbre. The judge had found both of them to be "credible witnesses" (paragraph 99). He had found that there would be "insurmountable obstacles" to their continuing their family life in Afghanistan. The judge had

made reference to **AS (Safety of Kabul) [2020] UKUT 130** to the effect that whilst it would be generally reasonable for a single man with no family responsibilities to return to Kabul, this was not a case of the Appellant alone returning to Kabul, but doing so with a partner who has never been to Afghanistan and, who cannot speak the language and is unfamiliar with the culture (at paragraph 110). The judge had also found that, "It would be very difficult for Ms Lumbre to find work in Afghanistan given she is in her early 60's and the lack of opportunities for manual work like cleaning" (paragraph 111). So, plainly, the Appellant and his partner cannot return together to Afghanistan.

30. The question is whether the Appellant can go to the Philippines with Ms Aurelia Lumbre. It is not a matter of insignificance that Ms Lumbre, however, has indefinite leave to remain in this country. Even if that were not the case, there is no guarantee that the Appellant would be able to enter the Philippines as the partner of Ms Aurelia Lumbre. On the contrary, I find that he will face difficulties. Even if he were to gain entry, this would be on the basis of his relationship with a woman who is lawfully married to a husband, both of whom are Catholics, and for neither of whom is divorce practicable. In these circumstances, there would be insurmountable obstacles to the relationship continuing in the Philippines.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I have set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

Satvinder S Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th October 2023