



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02257/2015**

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Birmingham
On 2 February 2016**

**Sent to parties on:
On 12 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

**M S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Abu Reza, Sultan Lloyd Solicitors

For the Respondent: Mr Wild, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan. On 30 June 2014 he made an application for further leave to remain on the basis that he should be granted asylum in the UK and recognised as a refugee under the 1951 Convention (The Geneva Convention). The Respondent refused his application on 26 January 2015 and gave directions for his removal under s47 of the Immigration, Asylum and Nationality Act 2006.
2. The Appellant appealed against that decision and the appeal came before First-tier Tribunal Judge Lodge who dismissed it in a decision promulgated

on 27 April 2015. The First-tier Tribunal found that the Appellant was not refugee and that he did not meet the private life requirements under paragraph 276ADE of the Immigration Rules and under Article 8 ECHR.

3. The Appellant sought permission to appeal that decision and permission was granted by First-tier Tribunal Judge Shimmin on 25 June 2015. Permission was granted on all grounds but in particular, in relation to the ground that the Judge had applied the wrong standard of proof.

The Grounds

4. The grounds assert that the First-tier Tribunal mistook the Appellant for a Pakistani national. The grounds further assert that the Judge applied the wrong standard proof. It is also contended that the Judge did not set out the Appellant's protection claim so that it was not possible to understand if his whole account was disbelieved. In particular it was not possible to know from the determination at paragraph 30 where the Appellant claimed to have resided in Afghanistan after fleeing his father.
5. It is also asserted that the First-tier Tribunal erred in its approach to paragraph 339K of the Immigration Rules and that the error was material because the Judge found that after a lapse of 5 years he would not be in danger from his father. The error is said to be compounded by the fact that the Judge sought independent confirmation of the Appellant's fear of his father at paragraph 29 of the decision. The First-tier Tribunal is said to have failed to assess the Appellant's account of his fear of forcible recruitment by the Taliban in accordance with the UNHCR eligibility guidelines for 2009 or 2010 by reference to the degree of insurgent activity in the Afghan province in which he resided and the case of **(HK (Minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG** [2010] UKUT 378 is relied on. The grounds also criticise the First-tier Tribunal for failing to have regard to the report by Dr Lisa Schuster of the statements made by the Afghan Minister for Refugees dated 4 March 2014. It is said that this was material because unless the Appellant could be returned to a safe province he could not reasonably relocate to Kabul given his fear of his father there. It is also asserted that the Judge failed to have regard to the UNHCR Eligibility Guidelines 2013 which reported that men and boys of fighting age were an at risk group.
6. The grounds further argue that the Judge erred in the assessment of whether removal was a proportionate interference with the Appellant's private/family life in that he failed to take account of the historic failure to discharge the tracing duty and wrongly held that the Appellant's private life was precarious notwithstanding the Appellant's four years lawful residence in the UK.

The Rule 24 Response

7. The Respondent submitted that the First-tier Tribunal directed itself appropriately and made reasonable, sustainable findings properly open to it on the evidence. Contrary to the grounds advanced the Respondent submitted that the First-tier Tribunal considered all material aspects of the Appellant's claim and that the Appellant's claim that the First-tier Tribunal had applied the wrong standard of proof was not made out since the phrase "substantial grounds for believing" derived from the reasonable degree of likelihood test and was properly open to it on the circumstances of the case. The Appellant had failed to discharge the burden of proof to the requisite standard. The Appellant was now an adult and his grounds were in mere disagreement with the negative outcome of the appeal and disclosed no material errors of law that would be considered capable of having a material impact upon the outcome of the appeal.

The Hearing

8. Mr Reza relied on his skeleton argument. He said that the reference in the First-tier Tribunal's decision to Pakistan may be a typing error. The First-tier employed a higher standard of proof to the Appellant's asylum claim than permitted. He misdirected himself that there should be "substantial grounds for believing" that he had a well-founded fear of persecution. The standard was at the lower end of balance of probability. Having started with the wrong standard he viewed the case differently. Had he started with a lower standard he would have come to a different conclusion. At paragraph 30 he concluded that just because he was not with his father for 5 years the risk had faded away. Past persecution was probative of future risk. It could be a starting point. Going to the core claim, the Appellant's main fear was that he would be targeted for recruitment. The case of **HK** was not considered by the Judge. There were various reports in the Appellant's bundle showing the Taliban activities. In paragraph 37 the Judge failed to consider UNHCR guidance. The authorities were obliged to take information from various sources. This was available for the Judge to consider. His failure to have regard to the guidance was a material error. According to UNHCR guidance, boys were forced to work for a group. At paragraphs 36 to 38 the Judge failed to consider the relevant reports about Afghanistan. There was no mention of the report of Lisa Schuster and no mention of the fact that 80% of the country was not secure. The Judge had been given an option to depart if the circumstances merited such a departure. The Respondent had not provided any report to show that Afghanistan was safe. The objective evidence as submitted by the Appellant referred to serious problems in integration. He came here as a minor and would go back as an adult with no experience of living alone. Kabul was not safe and lacking basic amenities. He invited me to set aside the decision and remit it for re-hearing.
9. Mr Wild submitted that the issue that Judge Shimmen considered to be the best point was standard of proof. It was the very point dealt with in **Kacaj**. The term "substantial grounds for believing" was considered and was the exact question that arose here. There were different ways of stating the standard of proof but all meant the same thing. Interestingly, the view of the

then President was it should be adopted in preference to any other. It was a starred case and remained guidance. Substantial grounds for believing was the best standard to use. Clearly there was no error. The question of past persecution that had to be seen in context and if it was in the home of a violent father and he would no longer be living there. He was not returning to the same circumstances. It was a red-herring. With regard to the risk of forced recruitment, **HK** was about the risk of false recruitment in the context of minors and the section expressly said that evidence was required to show that it was a real risk for the particular child. The Appellant was over 20 by the First-tier hearing. There had to be something more to show that there was a risk of being targeted. The country guidance cases supported his finding that the Appellant was not at risk. The UNHCR guidelines and country guidance decisions had been considered in various cases and it had been expressly found that the UNHCR guidelines are in no way binding on the Tribunal and the fact that they say a risk category exists does not mean that it is determinative. The country guidance case law was binding and in relation to this issue of forced recruitment we had guidance that it was not a real risk. The fact that the UNHCR guidelines said otherwise was not relevant. Article 8 of the Procedures Directive stated that up to date information should be provided to decision makers but it did not say that UNHCR guidelines should be followed. In this country we had a country guidance system where all evidence was considered that other judges should follow. This directive did not demonstrate that this First-tier Judge had erred. The grounds were drafted prior to the case of **R (on the application of Naziri and Others) v SSHD (JR - scope - evidence) IJR [2015] UKUT 00437 (IAC)** and it was reasonable that when grounds were lodged in May, returns were up in the air and Judge made no findings. In **Naziri** the Upper Tribunal President found that returns should be continued. If there was need to look at this again then this could be done by way of a fresh claim. As to this First-tier Tribunal decision the Judge did consider these arguments, not in great detail and said that he did not accept that there was evidence to go beyond the country guidance cases. That conclusion was upheld by **Naziri** shortly thereafter.

10. In reply Mr Reza said that even in the case of **Kacaj** at paragraph 39 the test was real risk. The Judge should be obliged to take this into consideration because it was an EU directive. It was on the core issue of forced recruitment and the Judge was obliged to take this into consideration. If the matter to be reheard it should be remitted to the First-tier. Mr Wild submitted that if the error related to the standard of proof start again but other points stay here.

Decision

11. I have considered each of the grounds of appeal in turn. I have had regard to Mr Reza's skeleton argument. The first ground is that the Judge mistook the Appellant for a Pakistani national. It is correct that the Appellant is described as citizen of Pakistan in paragraph 1 of the decision of the First-tier Tribunal. However, this is the only reference to Pakistan and it is clear

from the rest of the decision that the First-tier Tribunal was fully aware that the Appellant was a national of Afghanistan and assessed the risk against his return to that country.

12. The second ground asserts that the First-tier Tribunal applied the wrong standard of proof to the Appellant's international protection claims thereby raising the bar to the Appellant's success on appeal.

13. At paragraph 6 of the decision the First-tier Tribunal directed itself as to the law on asylum stating that:

"In essence, an Appellant will have to show that there are substantial grounds for believing that he is outside his country of nationality or, if applicable, his country of habitual residence, by reason of a well-founded fear of persecution for a Refugee Convention reason and is unable or unwilling, owing to such fear, to avail himself of the protection of that country.

14. At paragraph 7 of the decision the First-tier Tribunal directed itself as to the law on humanitarian protection stating that:

"In essence, he will have to show that there are substantial grounds for believing that, if returned, he would face a real risk of suffering serious harm and he is unable, or, owing to such risks, unwilling to avail himself of the protection of the country of return."

15. In the starred decision of **Kacaj v SSHD APPEAL No. CC/23044/2000** the Immigration Appeal Tribunal, as it then was, considered the standard of proof in asylum and Article 3 claims and the expressions that could be used to identify the correct standard at [12]:

"Various expressions have been used to identify the correct standard of proof required for asylum claims. These stem from language used by Lord Diplock in *R v Governor of Pentonville Prison ex p. Fernandez* [1971] 2 All ER 691 at p.697, cited by Lord Keith in *Sivakumaran* at [1988] 1 All E.R. 198. Lord Diplock said that the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning. There must be a real or substantial risk of persecution. The test formulated by the European Court requires the decision maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment. That is no different from the test applicable to asylum claims. The decision maker and appellate body will consider the material before them and will decide whether the existence of a real risk is made out. The words 'substantial grounds for believing' do not and are not intended to qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established. They merely indicate the standard which must be applied to answer that question and demonstrate that it is not that of proof beyond reasonable doubt. The adjudicator in the instant case used the expressions "'a reasonable chance' or 'a serious possibility'" when considering the asylum claim, both of which are used by Lord Diplock. In our view, now that the European Court has fixed on a particular expression and it is one which is entirely appropriate for both asylum and human rights claims, it should be adopted in preference to any other, albeit others may be intended to convey the same meaning. This will lead to complete consistency of approach and avoid arguments such as were raised by Mr. Tam that the adjudicator in using the expression 'reasonable likelihood' in

relation to Article 3 was applying too low a test. The use of the words 'real risk' also has the advantage of making clear that there must be more than a mere possibility. The adjective 'real' must be given its proper weight. Anxious though the scrutiny must be and serious though the effect of a wrongful return may be, the applicant must establish that the risk of persecution or other violation of his human rights is real. The standard may be a relatively low one, but it is for the applicant to establish his claim to that standard.”

16. It is clear from this passage that “substantial grounds for believing” was considered to be the correct test in relation to both Conventions. This ground of appeal therefore fails.
17. The third ground is that the First-tier Tribunal did not set out the Appellant’s international protection claim and that consequently that it was not possible to understand the whole of the Appellant’s account that was disbelieved. It is said that in particular it is not possible to know from the determination at paragraph 30 where the Appellant claimed to have resided in Afghanistan after fleeing his father.
18. I do not consider that there is any merit in this ground of appeal. It is clear from reading the decision that the First-tier Tribunal understood the basis of the Appellant’s claim that the Taliban were attempting to recruit him and that he feared persecution as a result of ill-treatment by his father (paragraph 27). He makes clear and sustainable adverse credibility findings in relation to each of these claims at paragraphs 29 to 35 of the decision. The grounds do not in any event, set out what evidence it is said that the First-tier Tribunal should have and did not have regard to. His finding at paragraph 30 is clear. He found there was a discrepancy in the Appellant’s evidence in relation to where he and his brother lived as the Appellant had said, as recorded in paragraph 29 of the decision, that he had lived twenty minutes from his father and, as recorded in paragraph 30, that he and his brother had lived in a different province far away.
19. The fourth ground is that the First-tier Tribunal disregarded paragraph 339K of the Immigration Rules which implemented Article 4 (4) of the Qualification Directive 2004/83. The First-tier Tribunal found at paragraph 31 that the Appellant’s father would not pose any danger to him after five years. He found that the Appellant left Afghanistan when he was 13 or 14 and was over 18 at the date of the hearing. In relation to the risk from the Appellant’s father, the Tribunal found that there were discrepancies in the evidence as to how far the Appellant lived from his father and that after five years his father would not pose him any danger. It was the Appellant’s evidence that he had no contact with his father after he and his brother had stolen money from him. The First-tier Tribunal did not make a finding that the Appellant had been subject to past persecution from his father. In the light of his findings, there was no error of law in failing to direct himself in accordance with paragraph 339K of the Immigration Rules. Further there is no basis for the assertion in the grounds that the First-tier Tribunal sought “independent confirmation” of the Appellant’s fear.

20. Paragraphs 7 to 9 of the grounds can be dealt with together as those paragraphs essentially raise the same alleged error of law. The Appellant asserts that at paragraphs 32-33 and 35 the First-tier Tribunal failed to assess the Appellant's account of his fear of forcible recruitment by the Taliban in accordance with UNHCR eligibility guidelines for 2009 or 2010 or by reference to the degree of insurgent activity in the Afghan province in which he resided. The grounds also assert that the Judge failed to have regard to the UNHCR Eligibility guidelines 2013 which reported that men and boys of fighting age were in an at risk group. At paragraph 8 the grounds allege that the First-tier Tribunal failed to have regard to a report by Dr Lisa Schuster and that this report was material because unless the Appellant could be returned to a safe province he could not reasonably relocate to Kabul given his fear of his father there.
21. The First-tier Tribunal found, at paragraph 35, that the Appellant was not targeted by the Taliban. He concluded that the Appellant would not be in any specific danger from the Taliban. At paragraphs 36 and 37 he rejected the submission that Afghanistan was so dangerous that no citizen of that country should be returned. He recorded that he was not referred to any part or parts of the background evidence in the Appellant's bundle which applied directly to the Appellant. He concluded, on the basis of the Country Information and Guidance from February 2015, that individuals with no political affiliations or connections to, for example, military, the justice system etc. were in significant danger. He found that the Appellant fell into none of the categories there and was not at risk of serious harm. He concluded that the Appellant could safely return to Kabul.
22. In **SG (Iraq) v SSHD; OR (Iraq) v SSHD [2012] EWCA Civ 940** the Court of Appeal concluded that the country guidance procedure was aimed at arriving at a reliable and accurate determination and it was for those reasons, as well as the desirability of consistency, that decision-makers and tribunal judges were required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, were adduced justifying not doing so (paras 43 - 50). In **SA (Sri Lanka) v SSHD 2014 EWCA Civ 683** the Court of Appeal held that country guidance decisions are confirmation and statement of evidence relevant to the position of asylum seekers from the country in question. They are a convenient guide to the likely treatment of asylum seekers in that jurisdiction of the not intended to exclude other relevant evidence adduced by the parties in particular cases. In **TM, KM and LZ (Zimbabwe) (2010) EWCA Civ 916** the Court of Appeal said that the Tribunal must treat as binding any country guidance authority relevant to the issues in dispute unless there is good reason for not doing so, such as fresh evidence which casts doubt upon its conclusions, and a failure to follow the country guidance without good reason is likely to involve an error of law.
23. The Appellant's skeleton argument asserts that the Appellant's main fear is that if returned to Afghanistan, he will be targeted by the Taliban for recruitment and it is asserted that the First-tier Tribunal failed to consider

the case of **HK and others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG [2010] UKUT 378 (IAC)**. In that case the the Tribunal held that while forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility.

24. The First-tier Tribunal made reasoned and sustainable findings that the Appellant was not targeted by the Taliban in Afghanistan. The Appellant was an adult at the date of the First-tier Tribunal hearing and not a child. On the basis of the First-tier Tribunal's findings of fact and the Appellant's age there was no error of law in failing to refer to the case of **HK**.
25. In **AK(Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)** the Tribunal held that return to Kabul was not in general unsafe or unreasonable. Whilst the First-tier did not engage in great detail with the background evidence, he followed the country guidance and the UNHCR guidelines are not binding on him.
26. 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.
27. He engaged with the country evidence and clearly saw no good reason for not following the country guidance. There was no error of law in his approach to the country evidence or in following the current country guidance.
28. The last ground is that the First-tier Tribunal erred in the assessment of whether removal was a proportionate interference with the Appellant's private life. The First-tier Tribunal found, at paragraph 40, that the Appellant had established his private life whilst his immigration was precarious and in the circumstances little weight could be attached to it. There was no error of law in this conclusion because the Tribunal was mandated by virtue of section 117 (5) to give little weight to the Appellant's private life. In **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)** the Upper Tribunal held that those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or to remain. A person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. The

Appellant's presence in the UK was precarious because he had been here with discretionary leave to remain.

29. Whilst the grounds also assert that the First-tier Tribunal failed to take account of the "historic failure to discharge the tracing duty" in assessing whether the Appellant's removal was a proportionate interference with his private life, no arguments were advanced at the hearing or in the skeleton argument. In the absence of further particularisation or argument, this ground cannot succeed in the light of the Court of Appeal decision in **EU and others [2013] EWCA Civ 32**.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an anonymity order. I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as the Appellant claims to be at risk of harm.

The Appellant is granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. 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

Deputy Upper Tribunal Judge L J Murray