



IAC-TH-WYL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/02322/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2015**

**Decision & Reasons Promulgated
On 9 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**AS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran of Counsel, JD Spicer Zeb, solicitors

For the Respondent: Mr S Staunton of the Specialist Appeals Team

ERROR OF LAW DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. 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.

The Appellant

2. The Appellant is an Afghan national whose date of birth is given as 1 January 1995. In February 2009 he arrived in the United Kingdom as an unaccompanied minor and five days later claimed subsidiary protection because he feared persecution on return to Afghanistan on account of his father's involvement with the Taliban.
3. The Respondent granted him discretionary leave until 1 July 2012. In time, on 22 June 2012 the Appellant made an application for further leave to remain which on 8 January 2015 the Respondent refused and proposed to make directions for his removal to Afghanistan. The reasons for the decision were given in a letter of 8 January 2015 (the reasons letter). The Respondent did not address the Appellant's subsidiary protection claim to any extent because she found he had not appealed the refusal of subsidiary protection when granted discretionary leave in September 2009 and this cast doubt on the credibility of his protection claim: see paragraph 12 of the reasons letter.
4. The Respondent went on to consider the return of the Appellant to Kabul referring extensively to various determinations of the Upper Tribunal and concluded that his return would not place the United Kingdom in breach of its obligations under Articles 2 and 3 of the European Convention. The Respondent then addressed the Appellant's claim under Article 8 of the European Convention with reference to paragraph 276ADE(1) of the Immigration Rules. She dealt at length on the time critical factors imposed in the Rules and dealt very briefly at paragraph 80 with the issue of ties to Afghanistan as referred to by paragraph 276ADE(1)(vi). She went on to consider his claim under Article 8 of the European Convention outside the Immigration Rules and concluded his parents and siblings remained in Afghanistan and it would not be disproportionate to return him.
5. On 10 February 2015 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are formulaic and include a Statement of Additional Grounds referring to Articles 2, 3, 13 and 14 of the European Convention and also to the Refugee Convention.

The First-tier Tribunal's Decision

6. By a decision promulgated on 24 August 2015 Judge of the First-tier Tribunal I. Malcolm dismissed the Appellant's appeal on all grounds.
7. On 29 September 2015 Judge of the First-tier Tribunal Grimmatt granted permission to appeal on the ground that it was arguable the Judge had failed to make a finding on the Appellant's credibility and to consider the latest background evidence on the situation in Kabul.

The Upper Tribunal Hearing

8. The Appellant attended, accompanied by his uncle and a friend. I explained the purpose of and the procedure to be adopted at the hearing.

Submissions for the Appellant

9. Ms Loughran addressed the two grounds for appeal set out in the permission application and for which permission had been granted. The Judge had not made an express finding whether she accepted the Appellant's account why he had left Afghanistan. Even the Respondent in her response of 13 October 2015 under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) accepted it was only implicit upon reading the decision as a whole that the Judge had found the Appellant not to be credible was inadequate. The Judge had failed to consider whether if the Appellant's account were credible he would not be at risk on return. All her findings had been adverse. At paragraph 48 of her decision she had accepted the apparent inconsistencies identified in the interview replies were not material and had placed more weight on the implausibility of the claim that the Appellant had left Afghanistan and had come to the United Kingdom and had no contact details for his mother.
10. At paragraph 51, the Judge had noted the Respondent had accepted the Appellant's nationality but she had not made any findings on the Appellant's subjective evidence and had relied on background evidence only when making her express finding that the Appellant was neither credible nor a witness of truth.
11. At paragraph 55 of her decision the Judge had failed to make a finding whether the Appellant on return would be at risk in his home area. She had considered internal relocation in Kabul. At paragraph 54, she had referred to the country guidance case of *AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)* and noted she was required to give consideration to it. The Appellant's argument was that since *AK* had been reported the security situation in Afghanistan and in Kabul had deteriorated. The attention of the Judge had been drawn to the background evidence prepared subsequent to the reporting of *AK* and which was in the Appellant's bundle at the hearing before the Judge. I see it was expressly referred to in submissions as recorded by the Judge in her Record of Proceedings.
12. The Judge was obliged to give consideration to *AK* but in view of the submissions made about the change of situation evidenced in the background information, the Judge was obliged to consider such evidence and whether she was still bound to follow *AK* as there were very strong grounds supported by cogent evidence not to do so: see paragraphs 46 and 47 of the judgment in *SG (Iraq) v SSHD [2012] EWCA Civ 940*. The Judge had erred in failing to consider the details of *AK* and then whether she should depart from *AK* in the light of the additional and subsequent background evidence which the Appellant had submitted and to which reference had been made in submissions on his behalf. Additionally, I noted that since *AK* was reported the US and UK governments have withdrawn their combat troops from Afghanistan.
13. Ms Loughran continued that the Judge had failed to consider whether the Appellant could safely return to his home area but had immediately and only considered whether Kabul offered an internal flight alternative. She had erred in failing to apply the appropriate tests of safety and in finding whether the Appellant would be safe in Kabul and whether it would not be unduly harsh to require him to relocate there. The decision should be set aside in its entirety.

Submissions for the Respondent

14. Mr Staunton considered that looking at the Judge's decision as a whole and in particular paragraphs 48-53 it was clear that even if there was no express finding, the Judge did not accept the Appellant's account was credible. She was entitled to note there was no objective evidence to support the Appellant's claims about his father's involvement with the Taliban. At paragraph 53 she did not accept the Appellant's account about his family and the limited extent of efforts made to trace them. At paragraph 55 although she had not made express findings about whether return to Kabul would be safe and not unduly harsh for the Appellant, she clearly had these matters in mind when she found he was a fit young adult with skills acquired in the United Kingdom which he could be put to use in Afghanistan.
15. The Judge at paragraph 54 of her decision had stated she had considered all matters including AK. The 2015 background information was before her in the Appellant's bundle and this ground of appeal amounted to no more than a disagreement with the Judge's conclusions. The decision should be upheld.

Response for the Appellant

16. Ms Loughran argued in relation to the first ground for appeal that there was no requirement in subsidiary claims for corroborative evidence to be available. The Judge had made certain findings which were not adverse to the Appellant's credibility and had placed undue weight on his lack of contact information for his mother in Afghanistan. In any event, this was not central to the Appellant's claim. The lack of objective evidence about the Appellant's family did not absolve the Judge from the requirement to make a finding whether the Appellant's account was accepted in whole, in part or not at all and to give reasons for it. The limited efforts or results of efforts to trace the Appellant's family in Afghanistan did not alleviate the need for the Judge to make specific findings on the Appellant's claim about his father's involvement with the Taliban. The lack of objective evidence for this referred to in paragraph 52 of the decision was not a reason to reject the claim because there is no requirement that subsidiary protection claims must be corroborated.
17. Ms Loughran repeated the submission that the Judge had failed to make any finding whether the Appellant would be at risk in his home area but had proceeded at paragraph 55 of her decision to consider the risk to him in Kabul. Paragraph 55 amounted to a mis-direction in law because it failed to take account of the submissions made, relying on the background evidence before the Judge about security in Afghanistan and the submissions made on it. There was a wealth of evidence to support the submission that the security situation in Afghanistan, including in Kabul, had changed considerably since AK although it was open to the Judge to rely on AK she had failed to consider whether the more recent evidence was reason enough to depart from AK. She had not considered which was an error of law.
18. There was no clarification about the nature of the efforts to trace the Appellant's family and was referred to the letter from the British Red Cross at page 101 of the

Appellant's bundle. The fact was that the Appellant had made efforts to trace his family but the Respondent had not.

Findings and Consideration

19. I find that for the reasons stated in the Appellant's grounds for permission to appeal as explained by Ms Loughran in her submissions in the Upper Tribunal, the Judge has made errors of law as described in the grounds for and in the grant of permission to appeal. The Judge failed to make any express findings or even any express or adequate findings on the credibility of the Appellant's claim, supported by reference to his evidence. Other than relying on *AK*, she has failed to address the specific points made for the Appellant about the changes in the security situation in Kabul and Afghanistan since *AK* was reported in 2012 and as described in the documents in the Appellant's objective bundle of evidence, notwithstanding the submission noted at paragraph 37 about continuing violence in Kabul. The Judge needed to have made findings on the background evidence relevant to the security situation in the Appellant's home area because his safety there had to be assessed before the reasonableness of internal re-location to Kabul could be considered. Further, whether or not she found the Appellant credible, she needed to consider the risk to him on return to Afghanistan simply as a failed asylum seeker.
20. For these reasons I find that the First-tier Tribunal's decision contained errors of law such that it cannot stand and should be set aside in its entirety.
21. Having regard to the extent of the fact finding which will be required to re-make the decision and the provisions of s.12(2) of the Tribunals Courts and Enforcement Act 2007 and Practice Statement at 7.2(b) I consider the appeal should be remitted to the First-tier Tribunal to decide. The First-tier Tribunal may wish to consider the judgment in *TN and MA (Afghanistan) v SSHD [2015] UKSC 40* and the EASO Country of Origin Information Report of January 2015.

Anonymity

22. No reference was made to the discontinuance of the anonymity direction made by the First-tier Tribunal and in the circumstances I direct that it should continue.

NOTICE OF DECISION

The decision of the First-tier Tribunal involved the making of errors of law such that it should be set aside in its entirety and the appeal remitted to be heard afresh by the First-tier Tribunal.

Signed/Official Crest

Date 29. xii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal