Case No: C5/2020/1722
Neutral Citation Number: [2021] EWCA Civ 195

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 21 January 2021

Before:

LORD JUSTICE DAVIS
LORD JUSTICE ARNOLD

Between:

AS (AFGHANISTAN)

Applicant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
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Ms Sonali Naik QC (instructed by J D Spicer Zeb Solicitors) appeared on behalf of the **Applicant**

Mr Sarabjit Singh QC (instructed by the Government Legal Department) appeared on behalf of the **Respondent**

Judgment

(Approved)

LORD JUSTICE DAVIS:

1. This is an application seeking permission to appeal from a decision of the Upper Tribunal, comprising Upper Tribunal Judge Blum and Upper Tribunal Judge Sheridan, dated 1 May 2020. By that decision, the Upper Tribunal had dismissed an asylum and international protection appeal from a previous decision of the First-Tier Tribunal. The Upper Tribunal refused permission to appeal to this court. Since then, Lewis J on 23 October 2020 has directed an oral hearing of the application for permission to appeal in this court. It comes before this court on that basis.

2. I should note at the outset that the second appeals test applies to this appeal.

3. It is not the practice of this court to give elaborate and lengthy judgments on applications for permission to appeal and I do not propose to do so in this particular case. The whole background is very familiar to the parties.

4. Shortly put, the applicant is a national of Afghanistan. He is not himself from Kabul. He arrived in the United Kingdom in 2008. He made an asylum and humanitarian protection and human rights claim during 2014, which was rejected. The general context of his appeal related to the safety of the conditions in Kabul and the asserted risk of harm to him if he was to be returned there. His appeal was rejected by the First-tier Tribunal by decision of 26 July 2015. It was among other things held that he would be able to live a "relatively normal life" in Kabul and that he had no characteristics which indicated that he was particularly vulnerable, "in fact quite the reverse". His claim that he would be in danger was rejected.

5. The appellant appealed at that time to the Upper Tribunal. On that occasion, the decision on his appeal was given by Upper Tribunal Judge Allen and Upper Tribunal Judge Jackson. It was in the nature of a country guidance case decision. In particular, it concerned itself as to whether the then current situation in Kabul was such that the previous country guidance given in *AK (Article 15(c)) (Afghanistan) CG* [2012] UKUT 00163(IAC) required revision in the context of internal relocation.

6. On that occasion, by a very detailed decision, the Upper Tribunal held that the previous decision in *AK (Afghanistan)* remained unaffected: see [2018] UKUT 118 (IAC). At paragraph 241 of its decision, the Upper Tribunal also helpfully summarised its country guidance conclusions as to risk on return and as to internal relocation to Kabul. It was then decided that it was (a) safe and (b) reasonable for the appellant to be returned to Kabul.

7. There was an appeal to the Court of Appeal: [2019] 1 WLR 5345. The appeal was allowed by the Court of Appeal. That was essentially on the basis that the Upper Tribunal had, as it was decided, materially erred on the issue of risk in reaching a factual conclusion to the effect that 0.01 per cent of the civilian population of Kabul were casualties of violence when, as it was held, the evidence had indicated that the

figure was in fact 0.1 per cent. The case was remitted for further hearing in the Upper Tribunal. It may be noted that the appeal was dismissed in all other respects.

8. Amongst other things, in giving his reasons for disposing of the appeal, Underhill LJ said this in at paragraph 80 of his judgment:

> "In those circumstances it seems to me that the remittal to the Upper Tribunal can and should be on the basis that it need reconsider its conclusions only on the question of the extent of the risk to returned asylum-seekers from security incidents of the kind considered at paragraphs 190 to 199 of its Reasons … I would hold that there was no error of law in the tribunal's approach to the other elements …"

Then at paragraph 82 he said this:

> "Those limits on the scope of the remittal are subject to one important qualification. We were told that last year, after the decision of the Upper Tribunal, UNHCR produced further Guidelines on returns to Afghanistan which, unlike the 2016 version unequivocally recommend that 'given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city.' It will be for the tribunal, no doubt after hearing submissions, to consider whether that assessment requires a reconsideration of its country guidance on a more extensive basis than is required by the remittal of this appeal."

9. The matter then came back before the Upper Tribunal on that basis. The primary findings of fact, I should note, had been preserved. The Upper Tribunal received a considerable quantity of written and oral evidence, including that of three experts, Dr Schuster, Dr Giustozzi and Ms Winterbotham, as to conditions in Kabul and Afghanistan. The expert evidence was geared towards the general situation in Kabul and Afghanistan and not to the particular circumstances of the appellant's particular case. In addition, the Upper Tribunal had been presented with a considerable quantity of other objective country materials.

10. The Upper Tribunal, as I see it, dealt with all such evidence demonstrably very fully and carefully. It dealt with various headings relating to relevant topics: for example, the risk to a returnee from the Taliban, risk of forced recruitment to an armed group, risk by reason of westernisation, and other such risks. The tribunal went on to assess both the security position and the general conditions in Afghanistan and Kabul. It also considered the situation about the availability of relevant documents, such as taskeras, and any available social support of family systems to a returnee. It considered issues of housing, related amenities, health care, employment, and so on. It considered what assistance might be available on return. It also had regard to certain evidence as to the experiences of other returnees to Afghanistan.

11. After a lengthy and careful appraisal of all the evidence, on which the Upper Tribunal made findings at appropriate stages, its overall conclusion was expressed (in summary) in these terms:

"….considering all the circumstances together …. generally it will not be unreasonable for a single healthy man to relocate to Kabul …. However, in all cases an individualised case-by-case assessment is required….."

It summarised its guidance at paragraph 253 of its decision. The tribunal also went on to endorse the continued applicability of the previous country guidance decision in *AK (Afghanistan).*

12. At first sight, and indeed at second sight, this would appear to be an evaluative conclusion based on the Upper Tribunal's findings on the totality of the evidence. It is not at all obvious how it could give rise to an appeal under the second appeals test.

13. On behalf of the appellant, however, Ms Naik QC, in her skilful and well-presented submissions, primarily focused her arguments on what had been said in the UNHCR eligibility guidelines issued in August 2018. Those had followed the first Upper Tribunal decision on the appellant's appeal but had pre-dated the decision of the Court of Appeal, as, indeed, appears from what Underhill LJ himself had said.

14. I summarise greatly for present purposes: but the broad thrust of those UNHCR guidelines and overall conclusion is to the effect that, "given the current security, human rights and humanitarian structure of Kabul", internal relocation or flight to Kabul for refugees is "generally not available" in the city. We were also referred (as had been the Upper Tribunal) to what had been said in the UNHCR submissions to the European Court of Human Rights in the case of *M.J. v the Netherlands (Application No. 49259/18)* [2019], and to the UNHCR country of origin information report of December 2019 relating to Afghanistan.

15. The particular complaint made by Ms Naik is that the Upper Tribunal had not followed the UNHCR guidelines and other UNHCR materials and had erred in consequence in its conclusion that relocation to Kabul was capable of being a safe and reasonable option. Ms Naik submitted that the tribunal should have followed those UNHCR documents in the absence of strong countervailing reasons; and that the tribunal had wrongly directed itself in law in failing to take that approach. Ms Naik stressed that, as she said, the guidelines had contained a value judgment, it being stated that there was not "generally" an available option in returning to Kabul. It is a little unclear quite how that point, to my mind, can feature. It is the function of eligibility guidelines of this kind to make recommendations, as Mr Singh QC for the respondent pointed out. Nevertheless, the broad thrust of Ms Naik's submissions remained the same: that is to say, that the tribunal should have directed itself that it should follow those guidelines in the absence of strong countervailing reasons. She submits that, having heard argument on the point, the Upper Tribunal had wrongly directed itself in that regard in stating that

the UNHCR materials, although to be accorded considerable respect and authority, formed "part of the overall assessment, no more no less". It had gone on to say on that although the UNHCR analysis would typically command very considerable weight, the weight ultimately to be attributed to it would depend primarily on its intrinsic quality, rather than its provenance: see in particular what it said at paragraphs 175 and 176 of its decision.

16. I have considerable difficulties with that particular criticism raised by Ms Naik, with all respect to the arguments advanced. One thing is absolutely plain and that is that the Upper Tribunal had indeed had careful regard to the UNHCR eligibility guidelines so issued. It also had had regard to the 2019 submissions and the 2019 COI report, as well as all the other objective country evidence placed before it. The Upper Tribunal said in terms that all the UNHCR documents should be accorded "the greatest of respect". But it went on to explain in some detail why it did not follow those materials in the UNHCR's generalised conclusion. Indeed, what the Upper Tribunal was to explain and find was that when one looked at the generalised conclusion contained in the UNHCR eligibility guidelines, on close analysis it was not properly evidenced-based. I reject the submission made in the written arguments on behalf of the appellant that the Upper Tribunal had in some respect misunderstood the eligibility guidelines and other documents issued by the UNHCR.

17. Ms Naik nevertheless insisted that those guidelines were to be regarded as having special and authoritative status and were not to be departed from without substantial countervailing reasons. She submitted that the Upper Tribunal had been wrong not to direct itself accordingly. For this purpose, Ms Naik placed particular reliance on what had been said by Lord Kerr in the decision of the Supreme Court in the case of *IA (Iran)* [2014] 1WLR 384.

18. The decision in that case involved a context different from the present, not least because it did not concern eligibility guidelines or general reports issued by the UNHCR. Rather, it related to an actual decision concerning refugee status made by the UNHCR. In deciding what weight the tribunal in the domestic jurisdiction should give to that previous decision of the UNHCR, Lord Kerr said that that should be no presumption in favour of that prior UNHCR decision: see for example what he says at paragraph 37 of his judgment. He went on to say at paragraph 45:

> "I do not believe that the application of a presumption that the UNHCR decision should be followed unless shown to be wrong is appropriate."

At paragraph 48, he then said:

> "The circumstances that the weight to be given to the UNHCR decision cannot be articulated in an exact way must not be allowed to detract from the influence that it wields ... as a general rule, the

> UNHCR decision would have been taken at a time more proximate to the circumstances which caused the claim to have been made. Frequently, it will have been made with first-hand knowledge of and insight into those conditions superior to that which a national adjudicator can be expected to possess."

Then at paragraph 49 he went onto say this:

> "All of these factors require of the national decision-maker close attention to the UNHCR decision and considerable pause before arriving at a different conclusion. The approach cannot be more closely prescribed than this, in my opinion. The UNHCR conclusion on refugee status provides a substantial backdrop to the decision to be made by the national authority. A claimant for asylum who has been accorded refugee status by UNHCR starts in a significantly better position than the one who does not have that status. But I would be reluctant to subscribe to the notion that this represents 'a starting point' in the enquiry because that also hints at the idea of a presumption. Recognition of refugee status by UNHCR does not create a presumption, does not shift the burden of proof and is not a starting point, (if by that one implies that it is presumptively assumed to be conclusive) but substantial countervailing reasons are required to justify a different conclusion."

19. It is that last sentence on which Ms Naik has placed particular reliance for the purposes of her argument. I have to say I find that last sentence rather difficult to fit with all that Lord Kerr had previously stated: in particular in saying that there was no starting presumption and that really all one can say is that close attention to the UNHCR decision and considerable pause for arriving at a different conclusion should be given. But in any event, as I have said, those comments were made in the context of a specific decision of the UNHCR and not of eligibility guidelines or other general reports.

20. As I see it in fact, Lord Kerr to an extent modified what he had said in *IA (Iran)* in his subsequent judgment in the case of *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2014] AC 1321. There he again dealt with this broad point. I would refer in particular to his citation of what Sir Stephen Sedley had said in the Court of Appeal in that case and to his agreement with that assessment. At paragraph 74, Lord Kerr then went on to say with regard to the UNHCR material there adduced:

> "The UNHCR material should form part of the overall examination of the particular circumstances of each of the appellant's cases, no more and no less."

These words, of course, reflect what the Upper Tribunal had said in the present case.

21. As it seems to me, those authorities cannot in any way be said to displace, and indeed the comments in *EM (Eritrea)* positively support, what had been said and decided by the Court of Appeal in the prior case of *HF (Iraq)* [2014] I WLR 1329. In that particular case, what were directly in point, just as in the present case, were eligibility guidelines issued by the UNHCR. In effect leading counsel in that case had been advancing precisely the same approach as Ms Naik was advancing before us with regard to those UNHCR documents. But Elias LJ specifically rejected that argument as part of his decision, that being a decision with which the other members of the court agreed. Thus at paragraphs 43 and paragraph 44 of his judgment he said this:

> "43. Attractively as the point was put, I do not accept this submission. In my judgment, there is no justification for requiring the court in this context to approach its task any differently from other cases where it has to draw conclusions from primary findings of fact. The court must assess all the evidence affording such weight to different pieces of evidence as it thinks fit. No principle of international or domestic law dictates any different approach. The authorities which demonstrate the considerable respect which the courts afford to UNHCR material are entirely consistent with the conventional view that questions of weight are for the court. I do not believe that Sir Stephen Sedley was saying anything more than that in *EM*. He was not, in paragraph 41, asserting that the UNHCR report was presumptively binding, and indeed that submission had not been advanced before the court. Moreover, in the very next paragraph he noted that other reports will sometimes demand considerable respect also.
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> 44. There is, in my view, no justification for conferring this presumptively binding status on UNHCR reports merely because of their source. Frequently the court is faced, as in this case, with a raft of reports from various international, state and non-governmental organisations, and although the guidance enunciated in a UNHCR report will typically command very considerable respect, for the reasons given by the Tribunal in paragraph 277, it will do so because of its intrinsic quality rather than the status of its author. Ultimately each piece of evidence has to be put into the balance but the relative weight to be given to the different reports is for the decision maker."

22. What Elias LJ thus said with regard to a UNHCR report or guideline is that the court would have regard to it "because of its intrinsic quality rather than any status of its author." He also made clear that such a report, "will typically command very considerable respect." It was precisely that approach which the Upper Tribunal (having had all the relevant authorities cited to it) took in the present case.

23. As I see it, *HF (Iraq)* is binding authority on this particular point. Contrary to Ms Naik's submissions, that decision is not to be regarded as overtaken or displaced by what was subsequently said in *IA (Iran)* or *EM (Eritrea)*. In fact, I note that in *IA (Iran)*, it having been said that a domestic tribunal with responsibility of its own for

fact-finding was not required to follow a UNHCR decision, the Supreme Court actually upheld a domestic decision which was contrary to a prior UNHCR decision. Moreover, it is to be stressed that in this particular case, the Upper Tribunal, as it had said, indeed accorded the greatest of respect to the UNHCR guidelines and furthermore had given substantial reasons for explaining why it had departed from those guidelines. I would thus in any event, in fact, conclude, that the reasons given by the tribunal did indeed constitute "substantial countervailing reasons" in the words of Lord Kerr, if those were needed.

24. In all such circumstances, the underpinning premise of Ms Naik on her principal ground is, in my judgment, not even arguably made out.

25. Ms Naik also sought to say that the Upper Tribunal had not given sufficient reasons for departing from the guidelines. It is, however, wholly demonstrable that it had. She further sought to say, as further grounds, that the Upper Tribunal had failed to give sufficient reasons on the issues of reasonableness and on risk; and in effect complained that the reader of the judgment could not understand the Upper Tribunal's thought processes. Again, one only has to read this very full, careful and detailed decision of the Upper Tribunal to see that such a point does not begin to be arguable. It is quite plain that the Upper Tribunal had indeed fully considered all relevant points. It had expressed its conclusion taking all matters into account holistically, as it expressly said. Such arguments in any event could not possibly give rise to grounds which could meet the second appeals test.

26. I have considered, nevertheless, whether the points raised by Ms Naik should constitute some other compelling reason for this matter going before the Full Court. However, I do not think that there is a compelling reason for doing so. There has previously been a full country guidance decision in this case at a previous stage, mostly endorsed in the Court of Appeal. That has been supplemented and modified by this latest country guidance decision. The matter ultimately involved evaluative conclusions by reference to the evidence; and there was, as I conclude, no arguable error of law in the approach of the Upper Tribunal. There is no other sufficient reason for granting permission to appeal.

27. I should also make clear that the Upper Tribunal, quite rightly, said that all such cases ultimately will need to depend on the individual circumstances of the individual case: a point indeed made in the UNHCR eligibility guidelines themselves. And here the Upper Tribunal in the present case demonstrably gave consideration to the particular circumstances of this appellant.

28. Accordingly I would, for my part, refuse this application for permission to appeal.

LORD JUSTICE ARNOLD:

29. I agree.

Permission to cite this judgment given.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge