**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/08054/2012

**THE IMMIGRATION ACTS**

**Heard at Glasgow** **Determination promulgated**

**on 3 July 2013**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**MOHAMMAD NASIR MOHAMMAD ZAI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr D Byrne, Advocate, instructed by Neil Barnes, Solicitor
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1) The appellant is a citizen of Afghanistan whose date of birth has been recorded as 1 January 1990.

2) The respondent refused the appellant's asylum claim for reasons explained in a letter dated 17 August 2012.

3) First-tier Tribunal Judge Debra Clapham dismissed the appellant's appeal for reasons explained in her determination promulgated on 19 October 2012.

© CROWN COPYRIGHT 2013

4) These are the grounds of appeal on which the Upper Tribunal granted permission:

It is respectfully submitted that the First-tier Tribunal (hereinafter referred to as "the Tribunal") erred by failing to allow the appellant's appeal and failing to grant permission to appeal to the Upper Tribunal. The Tribunal accepted the appellant was an Afghan national and had worked for the British Army and the US Army as an interpreter (see paragraph 58) but did not accept the remainder of his account of being targeted by the Taleban and found he would not be at real risk on return. In particular the Tribunal erred:

(i) in assessing whether the appellant is at real risk, having accepted he worked as an interpreter for the British and US Army. At paragraph 67 the Tribunal has regard to country information relating to incidents against interpreters in Afghanistan. The Tribunal finds that those incidents occurred when the interpreters were actually working for the coalition forces and given the time between the appellant's resignation and his time in the UK, it seems that he did not come to the attention of the Taleban during that period. The Tribunal also finds that he was able to live in his home area without any problems. However, even if the Tribunal's findings in relation to not believing that the appellant was previously targeted by the Taleban are accepted, the Tribunal has reached a finding on prospective risk without having regard to paragraph 86 of *AK (Article 159c)) Afghanistan CG [2012] UKUT 163 (IAC)* which indicates the UNHCR risk profiles and *inter alia*, those include those individuals associated with, or perceived as supportive of, the Afghan Government and the international community, including the International Security Assistance Force (ISAF), such as the appellant. The Tribunal has reached the finding on prospective risk without having regard to paragraph 43 of *AK, supra* where it is noted that individuals were abducted for suspected of spying for the government. The Tribunal has reached a finding on whether there would be a risk to the appellant without having regard to the fact that the appellant would not be required to lie about his background either on return to his home are or were he to exercise internal flight. In those circumstances there is a real risk that his previous employment would be found out and he would be at a real risk. The Tribunal has thus reached a finding on prospective risk without having regard to relevant factors. If the Tribunal has regard to those factors the it has failed to supply adequate reasons as to why the appellant would not be at real risk on return in light of those factors;

(ii) in not accepting the Taleban would continue to threaten the appellant rather than just kill him (at paragraph 64). However, the Tribunal has reached that finding without taking into account the country information in *AK, supra*. There is no indication that the Taleban operate in a particular modus operandi (see for example *AK, supra* at paragraph 48) and the fact that the Taleban did not kill the appellant should not be taken as a reason for doubting the appellant's claim when viewed in the context of the information contained in a Country Guidance case. If the Tribunal has had regard to that factor then the Tribunal has failed to supply adequate reasons as to what impact that had when it reached the finding;

(iii) at paragraph 62. The Tribunal has failed to assess the appellant's position in relation to initially treating the threats as a joke but subsequently discussing them with his Commander. The Tribunal finds that the fact that the appellant has been unable to obtain any

documentary evidence from his commanding officer seems incredible. Firstly the Tribunal has erred by effectively looking for corroboration (see *Kasolo 13190*). Secondly even if the Tribunal is entitled to look for corroboration, it has applied the wrong standard of this being "incredible" rather than whether such corroborative material could reasonably be obtained (*see ST (Corroboration-Kasolo) Ethiopia [2004] UKIAT00119)*. In that regard the Tribunal has overlooked the appellant's explanation in his statement that he did not have the contact details for Captain Pride or the other people who knew him. If the Tribunal has had regard to the appellant's statement, the Tribunal has failed to give adequate reasons as to the impact this evidence had on its finding. The Tribunal has compounded this error by proceeding on a speculative basis that records would be kept in relation to the conversations between the appellant and his Commanding Officer;

(iv) by arriving at an irrational finding at paragraph 63 in finding that the documentation itself is self-serving. This is irrational as the Tribunal could say that about any evidence from an asylum seeker. The Tribunal do not point to anything that would indicate the documents are not genuine per se. Further the Tribunal has erred by only looking at the documents after coming to a negative credibility finding at paragraphs 60 and 61. The Tribunal has failed to look at the documents in the round (see *Kasolo, supra; Mibanga v Secretary of State for the Home Department [2005] INLR 377);*

(v) by reaching an irrational finding at paragraph 65, namely criticising the appellant for returning home to see his family before he left. The Tribunal has erred by failing to place this action in context, namely it was a brief family visit (see second page of the appellant's statement). There is nothing irrational in the appellant's actions and the Tribunal has erred in so finding;

(vi) by applying in practice too high a standard by judging the appellant's actions as to their incredibility rather than on the lower standard of reasonably likely (see paragraphs 62 and 64);

(vii) that the foregoing findings of the Tribunal would be undermined by the foregoing and accordingly the Tribunal has erred by failing to grant permission to appeal.

5) Further to ground (i), Mr Byrne submitted that AK establishes that a person who has been employed as an interpreter by the UK or USA Forces in Afghanistan falls into a particular category of risk in terms of Article 3 of the ECHR and of Article 15(c) of the Refugee Qualification Directive, or alternatively for purposes of Article 15(c) is at the top of a "sliding scale". Paragraph 86 of AK quotes a list of specific risk profiles as established by the UNHCR eligibility guidelines of 17 December 2010. Mr Byrne referred further to the guidelines themselves, although these were not drawn to the attention of the First-tier Tribunal. (Mr Matthews accepted that this material is in the public domain, and took no objection.) Mr Byrne submitted that pages 7 and 8 of the guidelines explain what lies behind the potential risk profiles, making it clear that civilians associated with or perceived as supportive of the coalition forces include interpreters. Mr Byrne returned to AK at paragraph 190 onwards, where the Tribunal attaches considerable weight to the UNHCR guidelines. The appellant as an interpreter could fall into a risk category, without more. The judge failed to distinguish between

an ordinary civilian and a person within one of the risk categories recognised in the guidelines and in AK.

6) Turning to ground (ii), it was submitted that there had been evidence that repetition of threats from the Taliban was typical of how they operated. It should not have been treated as adverse that they continued to issue threats rather than taking real measures against the appellant.

7) As to ground (iii), Mr Byrne said there was error by treating absence of corroboration as going to credibility. It was not clear what the Tribunal had in mind at paragraph 62, although it may have been the Tribunal expected that some record could have been obtained of the appellant disclosing to his commanding officer the threats made against him. Mr Byrne relied on ST at paragraph 15:

> … an appeal must be determined on the basis of the evidence produced but the weight to be attached to oral evidence may be affected by a failure to produce other evidence in support.

The matter was one of weight and not one of credibility. In any event, the evidence which the judge appeared to have in mind was not evidence of a nature which could reasonably be expected to have been available to the appellant. The judge erred by drawing an adverse credibility conclusion from inability to produce evidence of this nature.

8) On ground (iv) representatives agreed that the documents to which the judge refers at paragraph 63 are the police letter, two warning letters, and translations, pages 5-10 in the appellant's inventory in the First-tier Tribunal. Mr Byrne submitted that the judge gave no good reason for rejecting these as "self-serving", and that no reasonable Tribunal would have dismissed the documents for such reasons as were given.

9) Mr Byrne had nothing to add to paragraphs (v) – (vii) of the grounds.

10) Finally, Mr Byrne submitted that a decision should be substituted in the appellant's favour under reference to AK on the basis that it was sufficient to prove that he had been an interpreter for the coalition forces; alternatively, a fresh hearing should be fixed in the First-tier Tribunal, at which further background material could be produced and fresh findings reached on the facts in dispute.

11) Mr Matthews pointed out that the appellant ceased to work as an interpreter for the coalition forces in September 2011, 7 months before he left Afghanistan. The judge had not failed to consider whether the appellant's former occupation as an interpreter placed him at risk. She addressed that central issue in reaching her conclusions at paragraph 67. The UNHCR guidelines did include a history of assisting the coalition forces as a risk factor, and that was recognised in AK, but nothing in the case suggested that past employment as an interpreter automatically placed a person in any category of risk. The judge correctly identified that as an

issue of fact to be determined in each case. The appellant had ceased to be an interpreter. The judge had not given credit to his claims of recent threats, but rather found that the Taleban had shown no interest in him. Her finding that he was not at risk due to a profession he no longer engaged in was properly open to her and properly explained.

12) On ground (ii) Mr Matthews submitted that the judge was entitled to conclude at paragraph 64 that if the Taleban genuinely had a hostile interest in the appellant and had tracked him down to Kabul, they would have done something about it rather than continuing to issue threats on which they did not follow through. A finding of that nature in this particular case was not inconsistent with background evidence of the Taliban's use of threats as a general way of intimidating the people.

13) Mr Matthews noted that ground (iii) narrates the Tribunal's finding that the appellant was not credible in saying that he initially treated such threats as a joke. The ground did not criticise that finding, and it was one properly open to the Judge. Mr Matthews accepted that the appellant provided evidence that he was employed as an interpreter by the coalition forces. The judge's point may not have been ideally expressed, but in essence it seemed to be that the appellant had given no good explanation of why he would be unable to resume contact with Captain Pride, his commanding officer in the USA Forces. That was not an unreasonable expectation in the circumstances. It arose from what the appellant was recorded as saying in cross-examination at paragraphs 43 and 44 of the determination. The judge narrated the appellant's answers that he had no contact details, and that he was not allowed to engage in any further contact. That was plainly unlikely. The judge was entitled to take into account that the appellant had no good explanation for failing to bring this item of evidence.

14) On ground (iv), Mr Matthews referred to the two threatening letters, and noted that these do appear to date from the period of the alleged threats against the appellant. The extract police report also related to an incident of that period, although it was obtained significantly later. Mr Matthews accepted that the judge's view that the documentation was self-serving was not clearly explained, but he submitted that a conclusion on the documents could only be reached in the context of all the other evidence, and that the judge had been entitled to reach adverse conclusion for all the reasons given.

15) Finally, Mr Matthews observed that Mr Byrne had not sought to expand upon paragraphs (v) – (vii) of the grounds, and submitted that they did not advance the appellant's position.

16) Mr Byrne in response said that if it were to be accepted that paragraph 63 on the validity of the documentation is not well reasoned, that would be a central error. If a judge took the view that an appellant produced unreliable documentation on a matter crucial to his case, that was bound to colour all

the other findings, and an error in that respect would by itself justify a fresh hearing.

17) I reserved my determination.

18) AK does not support the proposition that anyone who has worked as an interpreter for the coalition forces is *ipso facto* entitled to protection, in any category.

19) The alternative submission that such an occupation lies towards the top end of the scale of potential risk is more soundly based. However, the judge had that in mind when she asked at paragraph 67:

> … The question is, does the fact that the appellant was an interpreter, as accepted, [put him] at risk?

20) The judge was entitled to reject the possibility that the Taleban would continue to threaten the appellant rather than just kill him. The fact that the Taleban operates in part through continued threats does not rule out such a conclusion in a case like this, where an appellant by his own account was a significant target in his own right, not just a subject of general intimidation.

21) The appellant produced reliable confirmation that he worked as an interpreter for the coalition forces. At first sight, an expectation that he could also produce some evidence of reporting threats to his commanding officer goes rather high. On closer examination, however, the judge was entitled to reject the appellant’s evidence that there might be difficulty in communicating with his commanding officer. That went to the heart of his claim. The fact that he gave a feeble explanation could rationally count against him.

22) A fine distinction cannot be drawn between a consideration going to the weight to be given to an aspect of the evidence and a consideration going to credibility. The overall evaluation of the claim about threats from the Taleban was a matter of credibility.

23) It is correct that the judge had no very strong reason for finding the police report and threatening letters to be self-serving. However, there is little that any judge could make of these documents, other than to find them reliable or not in the light of her other conclusions. I do not find that ground (iv) discloses any error of reasoning or of legal approach.

24) As to ground (v), the Tribunal was entitled to found on the appellant’s delay in leaving Afghanistan and on his return to the family home.

25) Paragraphs (vi) and (vii) of the grounds disclose nothing of substance.

26) Reading the determination fairly and as a whole, it adequately explains to the appellant why his evidence has been found wanting.

27) The making of the decision did not involve the making of any error on a point of law, such as to require the determination to be set aside, so it shall stand.

28) No anonymity order has been requested or made.

4 July 2013
Judge of the Upper Tribunal