IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00586/2014

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Determination Promulgated**
On 6 October 2014	**On 24 October 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR NIAZI KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Physsas, Counsel, instructed by Polpitiya & Co, solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of the First-tier Tribunal (which panel comprising First-tier Tribunal Judge Ford and Mrs L R Schmitt, JP) in which they dismissed his appeal against the decision made on 10 March 2014 to refuse to grant him asylum and to refuse to revoke a deportation order against him. The appellant is a

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citizen of Afghanistan born on 1 January 1991. He entered the United Kingdom in, it appears, 2010.

2. In summary, the appellant's case is that he fears persecution on return to Afghanistan as he is at risk of being killed due to his father and brother having been killed by the Taliban as his father had been involved in fighting against the Taliban as a commander within the Northern Alliance. His father and brother were killed during a rocket attack on the family home. His mother, however, was not killed. He learned that the Taliban were looking for him and thus with the assistance of his uncle, he left Afghanistan travelling overland to France from where he attempted to enter the United Kingdom.

3. On 26 August 2011 the appellant was convicted at Croydon Crown Court of one count of sexual assault on a female and one count of trespass with intent to commit a relevant sexual offence. He was sentenced to four years' imprisonment for these offences with an extension period of licence for three years; he was also ordered to sign the Sex Offenders Register for life. The court also recommended his deportation.

The Respondent's Case

4. The respondent's case is set out in detail in the refusal letter of 10 March 2014. The respondent considered that [27],

> "while it can be accepted that the Taliban may have killed your father because of his involvement as a commander with the Northern Alliance you have failed to substantiate why the Taliban made it be known to your neighbours in your village that they were also going to target and kill you also."

The respondent considered that the Afghan Government were not unable to protect the appellant; that he would be able to relocate to Kabul; that it would be reasonable to expect him to do so; and, that there was no indication that the Taliban would know where he would be on return and thus it was even less likely that the Taliban would kill him and return him because of his father's past activities as a commander with the Northern Alliance [33]. It was also considered that the applicant could seek the protection of the Afghan Police Force on return and there would be a sufficiency of protection for him.

5. The respondent considered that he was excluded from humanitarian protection due to his criminal conviction. She considered also that he was a person to whom Section 72 of the Nationality, Immigration and Asylum Act 2002 applied and that given the length of his sentence, in the absence of any exceptional circumstances, there was no reason why he should not be deported.

6. The appeal came before the First-tier Tribunal sitting at Birmingham on 9 June 2014. The appellant was represented by Mr I Polpitiya, solicitor; the respondent by Mr I Proctor, a Presenting Officer. The Tribunal first

observed [18] that the refusal letter was not entirely clear, noting in particular that at [27] it was unclear whether the respondent was conceding that the Taliban had killed the appellant's father because of his involvement as a commander with the Northern Alliance. The Tribunal noted that Mr Proctor conceded the letter could have been clearer but even if it were a concession it could not be read as a concession that the appellant was at real risk of persecution because of any involvement his father may have had with the Northern Alliance and because of his father being killed.

7. The Tribunal found:-

(i) the appellant's credibility had been undermined by the use of false names, attempts to enter the United Kingdom illegally and by not making an asylum claim until after he was aware of the Secretary of State's intention to deport him from the UK [30], [35];

(ii) that the appellant's claim was undermined by inconsistencies in it [36] noting that he had been inconsistent as to whether his mother is alive or dead [38]; the lack of evidence regarding the father's activities [39] finding that the appellant had been deliberately vague about the father's activities; that the account of the attack in which his father and brother had been killed in one room of the house in a rocket propelled grenade attack whilst mother was in the kitchen and not even injured to be highly implausible [40];

(iii) that they were not satisfied that the appellant's father was a Northern Alliance commander [42] that he was not under any threat from the Taliban beyond the threat that the Taliban posed to the public in general [44] nor did they accept that he would be perceived as supporting government forces or the Western Alliance and that he had fabricated his asylum claim to avoid deportation [44];

(iv) that even if the appellant's father was a commander in the Northern Alliance they did not accept that he was killed; even if he had been killed it was not accepted the Taliban have any ongoing interest in the appellant or that there was such interest in the appellant even if he were telling the truth that they would pursue him to Kabul [45]; that he would be able to support himself on return to Kabul [46].

8. The panel then went on to dismiss the appeal on all grounds including Article 8.

9. The appellant sought permission to appeal on the grounds that:-

(i) the Tribunal had erred in going behind the concession by the Secretary of State that the appellant's father was a commander in the Northern Alliance [4 to 5];

(ii) that had the Tribunal wished to go behind those findings they should have given notice of this, giving the applicant the opportunity to adduce evidence in support;

(iii) that the Tribunal's approach was thus procedurally unfair and the applicant had been denied a fair hearing;

(iv) that in the circumstances it was unreasonable for the Tribunal to draw inferences adverse to the appellant for failing to produce corroborative evidence in respect of facts which were not, prior to the hearing, in issue;

(v) that in purporting to consider whether the applicant would be at risk on return in the light of his father's position and history as the only surviving male member of the family, the Tribunal erred in failing to take into account that he was the only surviving male or take into account the background evidence of the attitude of the Taliban towards someone in the applicant's father's position and the applicant's position;

(vi) that in rejecting the applicant's claim to be at risk even if the appellant's father's history were accepted the Tribunal gave inadequate reasons for reaching the conclusion and failed to address or consider the background evidence.

10. The respondent, by way of a letter pursuant to Rule 24 dated 16 July 2014 avers that there had been no concession by her that the appellant's father was killed as claimed; and, that in any event, the Tribunal had concluded that there was no risk of the appellant being pursued to Kabul even taking the claim at its highest.

The Hearing

11. Ms Physsas accepted that there was no note from Mr Polpitiya as to what had occurred at the hearing before the First-tier Tribunal. Ms Physsas submitted that there was no suggestion that whether the appellant's father was a commander in the Northern Alliance or had been killed by the Taliban had been put to him in cross-examination. She submitted that even had the issue of the concession been alluded to in submissions, at the very least the panel should have raised the issue before drawing inferences adverse to the appellant.

12. Ms Physsas submitted also that in considering the appellant's case at its highest, the panel had failed properly to engage with the UNHCR guidelines which had been put before them or to the risks of the appellant on return to Kabul. She submitted also they had failed to deal properly with the issue of relocation.

13. Mr Whitwell submitted that there was no express concession in the refusal letter and that in any event, had it been ambiguous, the panel could still properly have reached the conclusions they did that the appellant would

not be at risk on return. He submitted that properly considered, the Tribunal had in fact engaged with the background evidence as could be seen from the determination at [27]. He submitted also that the panel had been entitled to draw inferences adverse to the appellant for his failure to call a paternal uncle as a witness.

14. In reply, Ms Physsas submitted properly considered, there was sufficient material in the UNCHR guidelines, in particular page 47, 43 and the detailed assessment of potential risk profiles from page 70 onwards.

Discussion

15. It is established law that an appellant is entitled to a fair hearing. Encompassed within that is the right to know what the case against him is, including knowing what is or is not in issue. If a matter is conceded, then it may well be unfair to proceed with a hearing if that concession is withdrawn in order that the appellant is able properly to prepare his case, if necessary after an adjournment.

16. The Upper Tribunal has given guidance as to how apparent concessions could be considered in **Kalidas (Agreed facts – best practice) [2012] UKUT 00327 (IAC)**.

> "27. CMRs and agreement of facts are efficient devices for focussing the issues before the First-tier Tribunal, which can save much time and effort. Based on the agreement, any oral evidence ought to have been brief and to the point. What the case principally required was specification of background materials on sufficiency of protection and availability of internal relocation in a case of threatened 'honour killing' in Tanzania. A witness statement or a skeleton argument focussed on the correct issues would have alerted the hearing judge. As matters turned out, there was a lengthy hearing and a lengthy determination resolving in detail matters which ought not to have been in dispute at all, while the real issues were given short shrift. That was such an unfair outcome that the determination has to be set aside and the decision reached again. There has been unnecessary procedure in both the First-tier Tribunal and the Upper Tribunal.
>
> 29. Parties should consider at as early a stage as possible, and preferably in advance of any CMR, what agreement can be reached on the scope of the issues and what concessions can be made. They should bear in mind the purposes of CMRs, set out in the Senior President's Practice Directions, paragraph 7. They should assist the First-tier Tribunal to produce in terms of PD 7.8:
>
> > … written confirmation of:-
> >
> > (a) any issues that have been agreed at the CMR hearing as being relevant to the determination of the appeal; and
> >
> > (b) any concessions made at the CMR hearing by a party.
>
> 34. Representatives have a joint responsibility to draw the attention of the judge at the outset of the substantive hearing to the extent of agreement reached, and the nature of the decision still required.
>
> 35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such

> further submissions as required. An adjournment may become necessary."

17. There was, however, no CMR in this case but equally there is no indication of any attempt by the appellant or his representatives sought to raise this issue prior to closing submissions.

18. In considering the refusal letter it is to be noted that the consideration of the application set out between paragraphs 15 to 44 proceeds from a basis which is not predicated on an assessment of the appellant's credibility; that issue is considered later on in the letter. Whilst certain allegations are dismissed, such as the allegation that the Taliban had made it known to his neighbours that they would target and kill him [27], this is rejected on the basis that it cannot be substantiated; there is no reference to credibility at this point.

19. Further, the respondent rejected the appellant's claim that he could not relocate to another area in Afghanistan on the basis of the background evidence [32], [33]. The submission that the Taliban would kill him if they are informed that he has returned was dismissed on the basis of objective evidence. Similarly it is evident from paragraph [41] that the respondent did not accept substantial parts of the claim, stating:

> "Therefore, in view of the fact that you have failed to produce evidence in support of your claim, the implausibility of the details you have provided of the alternatives that both police protection and internal flight provide, it is not accepted that you have a future fear of persecution from the Taliban in Afghanistan."

It is noted also that the appellant would not be of greater risk of ill-treatment than other Afghans in Afghanistan [43].

20. It is only after this passage [43] that the Secretary of State refers to inferences adverse to the appellant's credibility arising from his actions in attempting to enter the United Kingdom using different names [47], his failure to remain in France so that his asylum claim could be considered; and the delay in making an asylum claim until some eight months after he was served with a signed deportation order [52].

21. In this context and bearing in mind the comments at paragraph 41 of the refusal letter, it is not arguable that what is said at paragraph 27 is a concession. It is evident that what is intended there is an assessment of the appellant's case taken at its highest. I do not consider that this could reasonably have been seen as a concession, nor is there, for the reasons set out below, sufficient indication that the appellant had believed a material concession had been made; had prepared accordingly; or, in the light of the concession by Mr Polipitya (the appellant's representative) that any failure to adjourn was a procedural error capable of giving rise to an error of law.

22. There is an absence of any sufficient indication in the appellant's witness statement prepared for the First-tier Tribunal or in the grounds of appeal to that Tribunal that the appellant, or his advisors, considered that a concession had been made. While I accept that there were in cross-examination no challenges to the appellant's case that his father was a commander, or had been killed by the Taliban, the same can be said for other issues, and this is far from determinative of their having been a concession.

23. It appears from the Tribunal's Record of Proceedings, which I read out to both representatives, that Mr Proctor for the respondent had accepted that what was said at paragraph 27 of the refusal letter was unclear. The record also shows that Mr Polpitiya on behalf of the appellant conceded that no evidence could be produced to show that the Taliban killed the father although it was submitted by Mr Polpitiya that the Home Office had not contested this issue.

24. It is instructive that there was no objection from Mr Polpitiya at this stage in the proceedings – closing submissions - and no submission that the panel could not go behind what is now said to have been a concession; or, that the matters could and should have been put in cross-examination. There was thus no proper basis on which the appellant could have concluded that the Tribunal were bound by a concession on the facts made by the respondent.

25. Although I accept that there was no CMR, there is insufficient evidence of any attempt to raise the issue of any concession prior to the hearing, contrary to the guidance given in **Kalidas**. It was not raised at the beginning of the hearing and the acceptance that no evidence could be adduced to prove the appellant's father's involvement with the Northern Alliance is in effect an acceptance that that was in issue. There appears to have been no attempt on the part of the appellant's representatives, this issue having been raised, of any attempt to reopen examination-in-chief or to make further submissions. It is difficult in these circumstances to know what would have been achieved by an adjournment given the concession that no further evidence could be adduced. Accordingly, I am not satisfied that there was a procedural error on the particular facts of this case such that the appellant did not receive a fair hearing.

26. Accordingly, I am satisfied that the Tribunal was entitled to come to the findings that the appellant's father had not been killed by the Taliban, had not been a commander in the Northern Alliance and that the Taliban had never come looking for him. The challenge to the findings of the risk of return is predicated [see paragraph 10] on the applicant being at risk if his account were true. The finding that he would be at risk is not challenged on any other basis.

27. Further, and in any event, the Tribunal did consider the case taking it at its highest. It is evident from paragraph 27 that the panel had considered the UNHCR report, the only substantive background material produced by the

appellant, in detail. It was open to the panel to conclude [45] that there was no evidence, even taking the appellant's case at its highest, of continuing interest in him on the part of the Taliban.

28. Ms Physsas has helpfully taken me to several passages within the UNHCR guidelines, but I do not consider that, even taking the appellant's case at its highest, that these avail him. Whilst it is arguable that as a man of fighting age and his father being associated as being supportive of the government, those individuals who fall within that group are said to require a particularly careful examination of possible risks [43]. That is not an indication that they are at risk per se or that people associated with these people would be at risk. The position on internal flight at page 47 does not assist the appellant as although UNHCR considers that internal flight or relocation is reasonable only where the individual can expect to benefit from the support of his or her own family, community or tribe, the exception to this requirement of external support are single, able-bodied men who may in the circumstances be able to subsist without a family community in the urban and semi-urban areas if the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and are under effective government control. That would appear to be the case in Kabul as confirmed by the relevant country guidance cases.

29. Ms Physsas took me to the potential risk profile of individuals associated with or perceived as being a supporter of the government at page 70. Whilst there appears to have been kidnaps and threats against government employees there is little or no evidence to show that this has occurred in respect of member or commanders in the Northern Alliance. Further there is no indication that the appellant would be at risk from forced recruitment to the Taliban if he were in Kabul nor does the specific risks to men and boys of fighting age within the guidelines provide such evidence.

30. Whilst the panel's thus reasoning is succinct, it evident that they bore in mind the UNHCR guidelines, and their reasoning is sufficient for them to reach the conclusions made in line with Country Guidance.

31. For these reasons, I find that the determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed: Date: 23 October 2014

Upper Tribunal Judge Rintoul