IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04728/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 12th November 2015	**On 29th December 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M Y
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Mr N Diwnycz (Senior Home Office Presenting Officer)
For the Respondent: Mr M Saleem (Solicitor)

DECISION AND REASONS

Introduction

1. The Secretary of State has appealed, with permission, against a decision of the First-tier Tribunal (Judge Robson) who, in a determination promulgated on 3rd June 2015, allowed MY's appeal to it on humanitarian protection grounds. Whilst this is an appeal brought by the Secretary of State I will, for convenience, refer to the parties as

they were before the First-tier Tribunal. This means that I shall refer to MY as the Appellant and the Secretary of State as the Respondent.

How the Appeal Comes Before the Upper Tribunal for Determination

2. The Appellant is a national of Afghanistan, of Pashtun ethnicity, and he was born on 25th July 1968 in Kabul. He entered the United Kingdom on 2nd May 2002, claiming asylum upon arrival. The Respondent refused his application and the Appellant appealed. His appeal was heard by Immigration Judge P J G White on 13th December 2005. Judge White summarised the account offered by the Appellant and which underpinned his claim for asylum in this way;

> "15. The core of the Appellant's account is as follows. The Appellant's uncle was a minister in the Najibullah Government and an advisor in the Hafizullah Government. The Appellant joined the Ministry of Interior Affairs in 1981 as a commander of *[-]*. He subsequently became the commander of *[-]* for five years. During this time he was involved in combat with enemy forces. In 1986 the Appellant was transferred to Kabul, being appointed as commander of a unit which provided security services. The Appellant went to the former Czechoslovakia where he studied at a police academy for a year. On his return to Afghanistan he was posted to the Ministry of Interior Affairs in the *[-]* Department. He worked as a detective and had agents under his supervision. He worked there for three months. The Appellant was then transferred to become the deputy of *[-]* for five months where he was involved in detecting activities of opposition groups and drug smuggling activities. As a result of his work many people were arrested and some were killed during operations. It was suspected that many in a high position in the Government Authorities were also implicated in the smuggling. As result (sic) the Appellant's younger brother was kidnapped and later killed. The Appellant was then made the head of *[-]*. The Appellant was involved in a particular operation in which a relative of General Dostum of the Northern Alliance was killed. As a result threats were made against the Appellant. The Appellant's cow was attacked and his driver was injured. The Appellant then went to Russia for further education at a police academy and returned to Afghanistan in 1996. However because of the Appellant's actions against the Mujahedin the Appellant's home was attacked. The Appellant fled to Kunduz. Following the fall of the Taleban in 2002 the Appellant was arrested by General Dostum's men on account of his ethnicity. The Appellant was ill-treated during his week's detention but was not recognised by his captors. Eventually the Appellant secured his release by bribery and fled Afghanistan. The Appellant made his way to Moscow via Turkmenistan. From there he travelled to Poland and onward to the United Kingdom where he claimed asylum."

3. Judge White was required to consider what, if anything, in that account was true using what is commonly referred to as the "real risk" standard. He was also tasked with the responsibility of deciding whether, as the Respondent claimed, the Appellant was excluded from the protection afforded by the 1951 Refugee Convention by the operation of Article 1(F)(a) of the Convention in light of his involvement in the killing of some prisoners. In that context, the Appellant had acknowledged some involvement but he had offered a version of events which

sought to significantly minimise his culpability. Judge White, though, did not accept his protestations in that regard and concluded that he had been involved in the shooting of nine members of the Mujahedin who had been taken prisoner by Government forces for whom he was working and that he was not exonerated by his claim, even if true, that he was simply "carrying out orders". That was sufficient to dispose of the asylum claim. However, it was also necessary for Judge White to consider whether the Appellant might succeed in his appeal under Article 3 of the European Convention on Human Rights (ECHR). As to that, in dealing with a claimed fear of General Dostum, the judge said this;

> "38. The particular incident related by the Appellant that is however disputed is that concerning the Appellant's allegation that he killed a relative of General Dostum. After the first interview on 12th July 2004 the solicitors then representing the Appellant wrote to the Respondent detailing a particular incident in which the Appellant had shot men (and in particular *[-]*) under the command of Abdul Rashid [Dostum] while attempting to prevent a kidnap. As a result of this letter the Appellant was interviewed again. During the course of that second interview the Appellant gave further details of this incident which he said took place in 1989 (see question 6). The Appellant stated that at the time Dostum was in Najibullah's Government (question 11). The Appellant thought that *[-]* was a cousin of Dostum (question 13). At question 17 and onwards the Appellant described how he shot *[-]* with a rifle after a police officer was killed. The Appellant also stated that in the weeks following the shooting the Appellant's cow was attacked (see question 35 and onwards). He was advised to leave the country (question 39).
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> 39. It is correct that at the first interview the Appellant did not give details of this particular incident. But at the first interview the Appellant did make reference to General Dostum (see for example question 111). He referred to the fact that if General Dostum knew who the Appellant was 'he would have sucked [the Appellant's] blood' (IBID). The Appellant also suggested at the end of the interview that he had not given all the details of his account (see page A39). Overall the Appellant's account of the incidents of the shooting of *[-]* is given in a fair amount of detail in the second interview.
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> 40. Of General Dostum the CIPU Report states at paragraph 4.21 [on 1st March 2005, Reuters reported that President Karzai had appointed General Abdul Rashid Dostum, as his personal military chief of staff, despite calls by human rights groups for him to sideline warlords [24b]. On 3rd March 2005, BBC News reported the view of Human Rights Watch (HRW) that Dostum should not have been given the high profile military post. HRW expressed concern that it could mean he will not be held accountable for alleged past human rights abuses. Amnesty International also expressed concern over the appointment. [25c]. An earlier BBC News' report dated 20th January 2005 reported that General Dostum had survived an assassination attempt by a suicide bomber outside a mosque in the northern town of Sheberghan. He was unhurt but about twenty others were wounded.
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> > 'The Taleban said it carried out the attack to avenge the killing of its members … His fighters are accused of leaving hundreds of Taleban fighters to perish inside sealed steel containers after their defeat and capture.' [25ah].

At paragraph 5.81 it states

> 'On 29th April 2005, the Institute of War and Peace Reporting (IWPR) reported that "some are disappointed the president has given several of the warlords he has long railed against key positions in his Government." The IWPR Report noted that although technically three of Karzai's more controversial appointments, Abdul Rashid Dostum (chief of staff of the armed forces), Abdul Karim Khalili (second vice president) and Ismail Khan (minister of water and energy) are no longer warlords.,
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> > "All three men have been sighted by numerous human rights organisations as being responsible for thousands of deaths and numerous war crimes committed between the fall of the Najibullah Government in 1992 and the Taleban takeover in 1996." [73x]

41. Against that background I consider that it is not inherently implausible that General Dostum (or at least persons acting under his command) was involved in a kidnap attempt. Nor do I consider it inherently implausible that there would be an attempt to kill the Appellant as an act of revenge while the Appellant was travelling in his car (rather than, for example, to attack the Appellant while he was at his home). Looking at matters in the round as I am required to do and bearing in mind the low standard of proof I am prepared to give the Appellant the benefit of the doubt in the matter and find that the Appellant was involved in an incident in 1989 in which the Appellant shot a commander acting under General Dostum and as a result the Appellant has developed the personal animosity of General Dostum."

4. Thus, Judge White was accepting that the Appellant would, at that time, have been at risk of Article 3 ill-treatment at the hands of General Dostum. The judge's consideration of matters, though, did not end there. He went on to consider whether the Appellant might also be at risk as a consequence of his links to the previous Communist regimes in Afghanistan (see the summary of his account set out above) and his previous involvement with the People's Democratic Party of Afghanistan (PDPA). As to that, he said this;

> "44. The position of persons with links to the former Communist regime is dealt with in the CIPU Report at paragraph 6.316-6.337. The position of such persons is variable. A large number of former PDPA members and former officials of the intelligence service are working in the Government. Others are at risk.
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> 45. The UNHCR Report of June 2005 (extracts of which appear at paragraph 6.336 of the CIPU Report) states
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> > 'A large number of former People's Democratic Party of Afghanistan (PDPA) members as well as former officials of the Khad (the intelligence service) are working in the Government, including the security apparatus. A congress of the People's Democratic Party of Afghanistan (PDPA) in late 2003 which led to the creation of Hezb-e-Mutahid-e-Mili (National United Party) with 600 members under the former PDPA officials have founded several other new parties.
> >
> > While many former PDPA members and officials of the Communist Government, particularly those who enjoy the protection of and have strong links to the currently influential factions and individuals, are safe

> from exposure due to their political and professional past, a risk of persecution may persist for some members of the PDPA, later renamed Watan (Homeland). The exposure to risk depends on the individual's personal circumstances, family background, professional profile, links and whether he was associated with the human rights violations of the Communist regime in Afghanistan between 1979 and 1992.
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> Some former high ranking members of PDPA without factional protection from Islamic political parties or tribes or influential personalities are at greater risk of persecution. They include … Former military officials, members of the police force and Khad (security service) of the Communist regime also continue to be at risk, not only from current power holders but more so from the population (families of victims), given their identification with human rights abuses during the Communist regime.'

46. On the Appellant's own account the Appellant spent one week in the detention of General Dostum's men just prior to leaving Afghanistan (questions 107-114 of the first interview and questions 44-49 of the second interview). He was arrested (with many others) as a Pashtun. During his week in detention the true identity of the Appellant was not discovered; the Appellant obtained his release by bribery before his true identity was discovered. Whilst this may have been a lucky escape for the Appellant I do not consider that the Appellant's account of his temporary detention is inherently implausible. I do not consider that the Appellant's ability to hide his identity during one week detention (when he was arrested not so much as an individual but rather as one of a number of Pashtuns) is indicative that the Appellant would not be at risk in the long-term of persecution if he were now to return to Kabul.

47. Looking at matters in the round as I am required to do and bearing in mind

    (i) the low standard of proof required of the Appellant and

    (ii) the profile of the Appellant,

    for reasons as stated at paragraphs 34-46 above I find that in regard to Article 3, the Appellant has satisfied me that there is an insufficiency of state protection that would lead to a real risk that on his return to Afghanistan he would be exposed to torture or to inhuman or degrading treatment or punishment. I therefore conclude that to return the Appellant to Afghanistan would place the United Kingdom in breach of Article 3 of the ECHR."

5. So, as I interpret his words, Judge White was also finding that, even if he had not attracted the enmity of General Dostum, the Appellant would nevertheless have been at risk of Article 3 ill-treatment on account of his previous association with the former regimes and the PDPA and his history of having been involved in abuses of power.

6. I should perhaps add, at this stage, that I have set out a considerable amount of Judge White's reasoning because that will represent my starting point, following **Devaseelan v SSHD [2002] UKIAT 702**, when I come to consider how I should resolve the Appellant's current appeal.

7. There was no appeal, or at least no successful appeal, regarding Judge White's decision which was, following the above reasoning, to dismiss the appeal on asylum grounds but allow it on human rights grounds specifically with reference to Article 3.

8. The Appellant subsequently received various grants of limited leave on human rights grounds. However, an application for further leave he made on 17th April 2014 was, on 8th March 2015, refused by the Respondent and, at the same time as that refusal a decision was taken to remove him from the UK by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006. It might, initially, be thought surprising that having granted leave on the basis of Judge White's decision the Respondent would suddenly take a different view. However, the reasoning deployed by the Respondent is set out in a "reasons for refusal letter" of 6th March 2015. In that letter the Respondent notes that the Appellant had obtained an Afghani passport from the Embassy of Afghanistan in London which had been issued in July of 2007, that he had used that passport to leave the UK and travel to Pakistan in August of 2007, returning in November 2007, that he had not disclosed in making his current leave application that he had obtained such a passport and that, in November 2012, he had had that passport extended.

9. The Respondent considered the above to be significant because, in her view, had the Appellant received leave on asylum grounds under the 1951 Refugee Convention, the act of obtaining a passport would have, within the terms of that Convention, amounted to "voluntary re-availment of national protection" such that his asylum protection would have ceased. The Respondent accepted that the Appellant's leave was on human rights grounds, rather than asylum grounds, but commented "it is considered that the principles of the cessation clause outlined above still apply to you" and went on to say;

> "It is considered that you have voluntarily re-availed yourself of national protection and are no longer in need of international protection. As a result of your actions it is considered that the United Kingdom would not breach its obligations under Article 3 of the ECHR by returning you to Afghanistan."

10. The Respondent also expressed the view that, whilst Judge White had found that the Appellant had attracted the personal animosity of General Dostum, his approaching the Afghanistan Embassy for a passport was "incongruent with this finding". The Respondent also went on to decide that the Appellant could not rely upon Article 8 of the ECHR either within or outside the Immigration Rules.

11. The Appellant appealed against that decision and, in a determination signed on 3rd June 2015 (the date of promulgation is unclear) the First-tier Tribunal (Judge Robson), as is noted above, allowed his appeal on humanitarian protection grounds. At that appeal the Appellant had sought to reargue matters regarding his exclusion from the Refugee Convention but met with little success. As to those arguments, Judge Robson said this;

> "70. I have noted however in the determination of Immigration Judge White at paragraph 28 the following:

> 'Furthermore the Appellant's witness statement (prepared with the help of representatives only a few days before the hearing and adopted by the Appellant at the outset of his evidence-in-chief at the hearing)' states at paragraph 13:
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> > 'During this time my battalion captured ten men of Mujahedeen and I was given orders by the higher authorities to execute them. One of the detainees managed to escape'.
>
> At paragraph 30, it states:
>
> > 'I confirm that the Government employed me and no matter what, you have to obey higher orders. I had no other option but to follow the orders and ask my staff to execute Mujahedeen'.
>
> The Appellant stated that he had not been given an opportunity in interviews and at the hearing to properly explain his case.

71. I was referred to his witness statement of 22nd July 2013. At paragraphs 4 and 5 of that witness statement, the Appellant set out the position that he claimed had occurred and at paragraph 8 of that statement he said that he had made 'an unwavering resolution in his mind that they (the captive Mujahedeen) would not be shot.' He then proceeded at paragraph 9 to say that before he had a chance to take any action, the Mujahedeen jumped the sergeant who was watching them and managed to kill the sergeant. 'When the officers in my battalion saw that Mujahedeen were no longer restrained, they fired upon them and managed to kill nine of them'. He then explained that he decided to let the one Mujahedeen who started running away escape since he was not a threat to his battalion.

72. That explanation comes some eight years after the hearing before Immigration Judge White. Had the position be (sic) so badly misunderstood, I do not accept there would have been such a delay.

73. One of the reasons for the delay was apparently of lack of funding to mount appeals. However, on his own admission the Appellant said he was aware that Legal Aid would have been available for Judicial Review but chose not to go down that road as he would not be able to instruct the solicitors who had represented him, indeed the current solicitor. I do not find it credible that given an option of resolving a critical problem in his position, i.e. the misunderstanding of the position resulting in nine Mujahedeen being shot, he would not have taken the opportunity, whichever solicitor it was, of obtaining legal aid and pushing his claim forward. I do not find it credible that if it was the case that he had not been responsible personally for ordering the deaths of the nine Mujahedeen or indeed had made the statement referred to in the decision of Immigration Judge White, which I have quoted above, he would not have taken very urgent action to resolve that position.

74. I am satisfied that in all the circumstances that the correct decision of Immigration Judge White was correct and it still continues to be correct and that the Exclusion provision should stand."

12. I have set out those paragraphs in full because they are findings which have been preserved after a subsequent Upper Tribunal hearing. The judge went on to make other findings which have not been preserved, though he accepted that the Appellant had only used the passport to travel to Pakistan, that this was so that he could visit

his family members and that his visiting Pakistan would not have come to the attention of General Dostum. He disbelieved, though, some contentions made by the Appellant that the Authorities had still been actively looking for him in Pakistan and had recently issued summonses relating to him and that the Taleban had been asking about him and were aware of the fact that he was living in Great Britain.

13. The Respondent obtained permission to appeal to the Upper Tribunal in respect of the decision of Judge Robson. After a hearing of 24th August 2015 Upper Tribunal Judge Reeds set aside the decision of Judge Robson. Her detailed reasons for so doing appear in a determination of 25th August 2015. In a nutshell, however, she pointed out that Judge Robson could not properly allow the appeal on humanitarian protection grounds because similar exclusion clauses applied with respect to that form of protection as did with respect to asylum and the judge had found against the Appellant with respect to the operation of the exclusion clauses regarding asylum. She rejected a contention made on behalf of the Appellant that Judge Robson had intended to allow the appeal on Article 3 grounds but had simply made a typographical error. She preserved the above passages from Judge Robson's determination but nothing more.

14. The above, then, is how the appeal comes before me. My task was simply to decide, as was accepted by all parties, whether the Appellant's appeal should succeed under Article 3 of the ECHR. That was the only provision which remained in issue.

The Evidence Before Me

15. By the start of the hearing of 12th November 2015 I had, before me, a range of bundles of documents prepared and submitted on behalf of the Appellant. I had the Respondent's bundle which had been before Judge Robson. I have considered, with care, all of the documentation which has been provided. At the hearing I received oral evidence from the Appellant and also from a witness MZ. The bundles contained witness statements from each of them.

16. In summary, the Appellant said that he had had some difficulty in understanding the interpreters at his asylum interviews, the second interview being much more problematic in this regard. He had told the truth in his witness statement of 14th May 2015. He had not been to blame for the killing of any people in Afghanistan. He still fears General Dostum and the Government will not help him. He said of General Dostum "it's his Government". He also fears the Taleban in consequence of his previous link to Najibullah's regime. It had been very straightforward to obtain his passport from the Afghanistan Embassy and he had not had to spend much time there or answer very many questions. He had wanted the passport because his mother, who was in Pakistan, had been seriously ill. He went to Pakistan but stayed only in Peshawar. He also saw his own children at the same time. He has not made any further trips out of the country since. In cross-examination he said that he had studied in Russia when the Communists were in power in Afghanistan. When he obtained his passport from the Afghanistan Embassy he had not been asked to give an address in Afghanistan, he had simply had to indicate which province he was

from. He had provided his father's name. His children had been able to see him when he was in Peshawar because the border between Afghanistan and Pakistan was porous. He did not venture into Afghanistan. At the time of his appeal before Judge White, General Dostum had not been a member of the Government but he had had his own army. He was "just a commander then". He is now the vice president in the Government. He has been so since 2014. He had been accompanied by a friend (MZ) when he had gone to apply for his passport. He might have hid some information if he had been asked about things in more detail but he had not been.

17. MZ, who adopted his witness statement of 7th May 2015, told me that he had accompanied the Appellant when he had visited the Afghanistan Embassy. Only simple questions had been asked of him. The actual form filling process took fifteen to twenty minutes only. He had accompanied the Appellant in order to provide moral support. All he could say about the Appellant with respect to his passport application is that he is a national of Afghanistan. There was no formal interview and the process of form filling, in order to apply for a passport, is very simple. The passport was not given on the same day as the attendance at the embassy. He does not know whether the passport was subsequently sent to the Appellant or whether he called back to the embassy to collect it. The witness had not sought to use any influence in order to aid the passport application.

The Arguments Presented to me by the Representatives

18. Mr Diwnycz indicated he would rely upon the content of the reasons for refusal letter and the preserved findings of Judge Robson. I should conclude, he submitted, that the Appellant has re-availed himself of the protection of the authorities in Afghanistan. He had done so by obtaining the passport. This meant he would, if a refugee, have lost the protection of the 1951 Convention and it would be perverse if he were not, therefore, to lose the protection afforded by Article 3. Mr Diwnycz was not able to point me to any decided authority indicating that Article 3 protection would be lost in such circumstances. As to the decision of Judge White, and the application of the **Devaseelan** principles, he submitted that, as I understand it, there was new evidence being the Appellant's willingness to approach the Afghanistan Authorities at the embassy, which suggested that either he had never been at risk or no longer considered himself to be at risk in Afghanistan.

19. Mr Saleem, for the Appellant, said that there was no reason to suppose that Article 3 protection would be lost by the act of obtaining a passport. In any event, a careful reading of the relevant clauses within the Refugee Convention suggested that the Appellant, by simply obtaining a passport and using it to go to Pakistan for pressing family reasons, had not re-availed himself of the protection of his home country within the terms of that Convention. The evidence is that he had to provide only very little information in order to obtain his passport and the fact that he was willing to provide such limited information does not mean he does not regard himself as being at risk.

My Reasoning

20. Although the history has been somewhat protracted, it seems to me that the issues I now have to decide are relatively straightforward ones. The first of those is whether or not it can be said that the Appellant, through the act of applying for and obtaining his Afghani passport, through the Afghanistan Embassy in London, has, as a matter of law, lost his protection under Article 3 of the ECHR.

21. Mr Saleem seeks to persuade me, with close reference to the relevant parts of the Refugee Convention, that even if the Appellant had been recognised as a refugee, the acts he has performed would not have resulted in him losing that protection. His other argument is to the effect that, in any event, Article 3 affords absolute protection so whatever the position might be with respect to the Refugee Convention, if the Appellant is actually at risk of Article 3 ill-treatment he is entitled to Article 3 protection. Mr Diwnycz, though, submits that it would be "perverse" if that latter proposition were to be correct.

22. It has not been necessary for me to undertake a careful consideration of the precise wording of the Convention or the arguments which Mr Saleem put forward regarding such wording. This is because I am satisfied that the fact of obtaining a passport does not deprive a person previously dependent upon Article 3 protection, of that protection. It does not, as a matter of law, bring the ability to rely upon Article 3 protection to an end.

23. In this context, Mr Diwnycz was not able to take me to any authority in support of his argument and, indeed, he acknowledged that he could not do so. Protection for refugees, as such, is derived from the 1951 Refugee Convention. Protection on human rights grounds is derived from an entirely different Convention. In light of that it seems to me that there is simply no basis for contending that, as a matter of law, an act which would lead to the loss of protection under one Convention on the basis of specific wording in the provisions relating to that Convention, will do so in the other Convention, absent such wording. Article 3 does provide absolute protection. It is an unqualified Article of the ECHR. I do, therefore, find for the Appellant in this regard. This means I must now go on to consider whether, as a matter of fact, the Appellant is at risk of Article 3 ill-treatment upon return to Afghanistan. I am, of course, applying what is known as the "real risk" test and I bear in mind that the burden, in this context, rests upon the Appellant.

24. As indicated above, my starting point, given what is said in **Devaseelan**, must be the findings of Judge White. I have set out those findings, in some detail, above. Those findings, of course, do represent my starting point but, not necessarily, my end point.

25. Mr Diwnycz's sole argument, in this regard, is that the Appellant cannot be at risk of Article 3 ill-treatment in Afghanistan if he is prepared to make an approach to the Afghanistan Embassy in the United Kingdom and to give some personal details in order to obtain a passport. In this context, I note that Mr Diwnycz did not seek to persuade me that there was any other reason why I should depart from the findings of Judge White. He did he urge me to conclude that the Appellant had actually gone

to Afghanistan, as opposed to Pakistan. He did not urge me to conclude that any other evidence, apart from that relating to the passport, suggested I should depart from Judge White's findings. So, the issue here, on the basis of the case as it was put to me on behalf of the Respondent, is quite a narrow one.

26. The Appellant has consistently indicated that he obtained the passport for the specific purpose of visiting his sick family member in Pakistan and that he also took the opportunity to see some other relatives. He has consistently stated that, whilst he went to Peshawar in Pakistan, he did not actually go to Afghanistan and, as indicated, Mr Diwnycz did not seek to persuade me otherwise. It might be thought, of course, that a person genuinely afraid of the Authorities in Afghanistan would not expose himself to any risk of detection by approaching those Authorities for any reason at all. That was, essentially, Mr Diwnycz's argument. However, I find it plausible that, if the Appellant's wife were seriously unwell in Pakistan, he would wish to visit her. He provided some documentary evidence of her illness for the hearing before Judge Robson and that documentation, including a form completed by a medical officer at a hospital in Peshawar, is before me. It indicates that the Appellant's wife was, at the time, suffering from ischeamic heart disease. Both the Appellant and the witness from whom I heard, adopted witness statements in which they referred to the illness and there was no cross-examination on the point. Against that background I would accept the genuineness of the claimed illness and would also accept that, in such circumstances, the Appellant would want to visit Pakistan to see his ailing wife. I accept, against that background, that his bid to obtain a passport was understandable and does not, of itself, show that the findings of Judge White, bearing in mind **Devaseelan**, should be departed from.

27. Of course, Judge White was considering matters as they were some years ago. The Appellant's primary fear seems to me to be that of General Dostum and, therefore, if General Dostum was no longer on the scene that might represent a good reason for reaching a different conclusion to that of Judge White. However, if anything, matters have gone the opposite way. General Dostum now holds the position of vice president within the Government in Afghanistan and such was not in dispute before me. He does, therefore, occupy, on the face of it, a more powerful and influential position than was previously the case. In those circumstances, and absent any argument to the contrary, I would conclude that, if anything, the Appellant will be at greater risk upon return now than he would have been at the time Judge White was considering his case. I find, therefore, that as matters stand, if the Appellant were to be returned to Afghanistan he would face a real risk of Article 3 ill-treatment at the hands of General Dostum. My having reached that conclusion there is nothing more I need to say. Accordingly, the Appellant's appeal succeeds on human rights grounds.

Conclusions

The decision of the First-tier Tribunal (Judge Robson) has been set aside.

In remaking the decision I allow the Appellant's appeal on human rights grounds (Article 3 of the ECHR).

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

As no fee is payable there can be no fee award.

Signed Date

Upper Tribunal Judge Hemingway