Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05665/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decisions and Reasons Promulgated**
On 23 October 2015	**On 23 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR SIDEEQ TARAKHAIL
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Furner, Solicitor
For the Respondent: Miss A Fijiwala, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an adult and is a national of Afghanistan. He appealed against the decision of the respondent dated 17 July 2014. First-tier Tribunal Judge Callow dismissed the appellant's appeal. Permission to appeal was at first refused by First-tier Tribunal Judge Saffer on 5 June 2015 and then granted by Upper Tribunal Judge Lindsley who gave the appellant permission to appeal on 10 August 2015.

First-tier Tribunal's findings.

2. The First-tier Tribunal Judge dismissed the appellant's appeal. He accepted that the appellant's father worked for Zaman, an influential pro-government warlord in Afghanistan. The appellant claims that there was an attempt by the Taliban to abduct him from school but they made a mistake and took another boy instead.

3. In terms of risk on return to Afghanistan, the Judge took into account the **AK (article 15 (c)) Afghanistan CG [2012] UK UT00163 (IAC)** country guidance case, and found that the appellant can safely relocate to Kabul. He stated that the appellant has not demonstrated that it would not be reasonable to expect him to relocate internally within Afghanistan.

4. The Judge found that there was insufficient evidence to suggest that the Taliban had the motivation or the ability to pursue low-level collaborators in Kabul or other areas outside its control as the Taliban devotes its limited assets to cities to high-profile targets, from serving government officials upwards.

5. The Judge stated that the appellant's claim is not materially different from those considered by the upper Tribunal and the ECHR. He stated that contrary to the opinion of Dr Guitozzi, the appellant has no political profile. Any potential interest of the Taliban had in him can now be discounted by the lapse of time. The risk of being recruited by the Taliban has not been established. The impact of return to Kabul for the appellant will be lessened by the availability of return and reintegration packages. The appellant can call on the assistance available from Refugee Action through its voluntary assisted Return and Reintegration Programme.

6. By contrast, the appellant has never been to Kabul, and he had been the victim of serious past persecution on repeated occasions. Not only that, even after he fled his home area, those threats continued (with the roadside bomb attack on his father). He produced an expert report which explained in detail how he would be identified in Kabul, which the Judge did not (here, or at [22] below) consider or reject. He is in an entirely different position from either **H& B [2013] ECHR 298**, neither of whom had an accepted history of past persecution. Indeed it is far from clear that the Taliban even knew of **H&B**'s pro-government activities, such as they were.

7. Finally, the judge addresses the expert report at paragraph 22 and makes a number of legal errors. He disputes Dr Giustozzi's conclusion that any potential interest "can now be discounted by the lapse of time". But that was never part of the respondent's case. Had it been, the appellant would have produced evidence on it. Certainly there was no evidence adduced to found the judges contrary conclusion. Additionally the cogency of the judge's reasoning is seriously undermined by the guidance of the tribunal in **FB (lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090** which at paragraph 61 noted that "it is axiomatic where the appellant has been believed as to account of the past risk, that the Tribunal will be slow to find that the risk has ceased to exist in the absence of fresh material indicating a change in circumstances that is normally more than the passage of time alone."

8. The reference to "the risk of being recruited by the Taliban" is at best entirely irrelevant; at worst taken together with the comments in **AK** at paragraph 20, it may suggest that the Judge had in mind the wrong appellant. The references to return and reintegration packages to which, as the appellant noted in oral argument, there was simply no evidence whatsoever. The judge was in no position to undermine Dr Guistozzi's evidence about likely conditions in Kabul without any evidence as to what those packages comprised and whether the appellant would qualify for them. In any event, the unreasonableness of conditions in Kabul was a moot point if the appellant succeeded in his primary claim that he would be unsafe there.

9. The Judge has erred in his findings on risking relocation by his failure to make any obvious findings as to the risk in the appellant's home area. Taking into account irrelevant considerations such as the conclusions of the Tribunal in **AK** and giving no adequate reasons for his conclusions and failing to address an applied the principle now enshrined in Rule 339K of the Immigration Rules, that past persecution is probative of future risk absent some good reason (other than mere passage of time) to find otherwise and taking points against the appellant which had never been raised in argument, and without inviting submissions on those points.

10. The second ground is that the decision is not in accordance with the law. This is due to the respondent's prolonged failure to seek to trace his family. At the hearing it was accepted that this ground is no longer tenable in light of the Court of Appeal's recent decision.

11. The third ground of appeal is that the Judge made errors in his Article 8 assessment. At paragraph 25 the Judge recognised that the critical question under the relevant Immigration Rules was whether there were "very significant obstacles" to the appellant's integration in Afghanistan. In his conclusion at paragraph 28 finding that there were no such obstacles, the Judge failed to have regard to his own findings on credibility. It was obviously relevant to that question that the appellant had suffered serious past persecution in Afghanistan, and had effectively lost his entire biological family at the age of 14. It was obviously relevant that if returned now, he would be losing his second family in the United Kingdom in the space of five years, and would be returned to a country where he had no surviving relatives. None of this was considered by the Judge.

12. Moreover, the reasoning that the appellant had demonstrated himself to be resourceful is with respect a cliché unsupported by evidence. A 14-year-old child does not demonstrate himself to be resourceful by enduring a difficult journey facilitated entirely by others. Certainly he does not, in enduring that, demonstrate that there are no significant barriers to his integration. The Judge's findings on paragraph 276 ADE are unsustainable for these reasons. The Judge has omitted relevant considerations and given inadequate reasons for his findings.

13. In respect of Article 8 analysis outside the Immigration Rules, the Judge addresses the determinative question of proportionality and in doing so, he entirely fails to factor in either the significance of the respondent's failure to trace, and the

respondent's long delay of some two years in determining the appellant's further leave application. Both were relevant and both were subject to argument and yet the Judge refers to neither of them.

14. Even more concerning at paragraph 43 the Judge places weight on "the appellant's adverse criminal history". The appellant had no criminal history whatsoever. The evidence before the Judge was that the appellant was of good character. Either the Judge had taken into account irrelevant considerations or he had confused this appellant with another yet again. In either event, his treatment of Article 8 cannot stand.

The hearing

15. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination. Mr Furner adopted his grounds of appeal which are extensive and stated the following, in summary. The Judge has failed to assess the appellant's risk to his home area and that is not in accordance with the law. The Judge did not consider the appellant's personal circumstances in assessing whether it would be unduly harsh for him to relocate to Afghanistan. Even if there are returned packages there still has to be an enquiry as to what they provide and whether they are genuinely helpful. The Judge did not address the Taliban's geographical capacity in his determination. He went against Prof Guistozi's report and said that the appellant does not have a political profile. Just referring to the passage of time is not enough in respect of paragraph 339K of the Immigration Rules. The Judge did not give the appellant an opportunity to address the case of **H&B** which the Judge took into account. This is post hearing research and is akin to evidential research because the Judge relied on it for assessment of facts. The situation in **H&B** was different.

16. Mr Furner accepted that in respect of the ground of appeal regarding tracing He is on shaky ground given the Court of Appeal's recent judgement. He advanced that if the respondent had traced the appellant's parents, this may have made a difference to the outcome and it would have been different and the appellant would have been granted refugee status earlier.

17. In respect of Article 8, the lack of tracing would be relevant. The appellant has been in this country for five years as a minor and is close to his foster mother and yet the Judge made no mention of that in his determination. The respondent's legal duty is to trace and failure to do so should be taken into account in assessing the weight to be given to Immigration Control. The Judge also failed to take into account the appellant's relationship with his foster parents and that he has no connections left in Afghanistan. The Judge also failed to take into account the two-year delay in dealing with this application. The delay is relevant when the appellant is a minor. At paragraph 43 the Judge said that the appellant had an adverse criminal history and fell into legal error.

18. Miss Fujiwala on behalf of the respondent submitted that there was no material error of law in the determination. She said that it is clear from the determination that the Judge found that there would be risk in the appellant's home area which is why he

considered internal relocation was suitable for the appellant. The Judge was correct in accepting **PM** to say that whether there would be a real risk at the airport. The headnote of **HK** states that the appellant has to show a real risk and no evidence was provided to the Judge to show real risk. In **AK** at paragraph 253, it was stated that a single male can return to Afghanistan and share accommodation and take the benefit of the return package. The Judge was correct to say that the appellant had no profile and his findings that lapse of time lowers risk to the appellant and these findings were open to him on the evidence. The Judge was entitled to take into account the case of **H&B** which was promulgated in 2013 and is in the public domain. Dr Giustozzi has been criticised in PM and other determinations. The Judge did take into account the principles in paragraph 339 of the Immigration Rules even if he did not mention the rule specifically in his determination. The judge has not fallen into error to say that the appellant can relocate to Kabul. In respect of tracing the Judge said that the Supreme Court has now determined the issue. The fact that the appellant might have been a refugee in 2010 does not impact on his status at the present time.

19. In respect of Article 8 she submitted that at paragraph 27, the Judge considers the appellant's individual circumstances and the fact that he has no ties to Kabul. At paragraph 253 of **AK** states that the single young male can live in Kabul. At paragraph 43 the Judge put weight on adverse criminal history and it is stated in the respondent's refusal letter that the appellant entered the country illegally. In any event this was not the central focus of his decision. Therefore under paragraph 117 (B) little weight should be given to someone with a precarious immigration history.

20. In reply Mr Furner stated that that the case of **AK** talks about forced recruitment. Dr Guistozzi's report states that the appellant will be targeted in Kabul. The Judge does not say why the appellant does not have a profile. The Judge give no reason why risk to the appellant has abated over time. The appellant was found to be a reliable witness.

Findings as to whether there is an error of law in the determination

21. I have considered the submissions and the grounds of appeal very carefully. It was argued on behalf of the appellant that the Judge has got the facts and has applied the law erroneously to the appellant's circumstances. It was submitted that the appellant has never said that he was at risk of forced recruitment by the Taliban and **AK** has nothing to say about those perceived as pro-government within accepted history of past persecution.

22. The appellant's case has been that he was targeted by the Taliban because of his father's pro-government activities. The appellant was only 14 years old at the date he left Afghanistan. His evidence was that the Taliban went to his school to kidnap him but instead took the wrong child. The appellant's evidence is that soon after he left Afghanistan as a minor.

23. The Judge was entitled, on the evidence, to find that the Taliban's interest in his father does not in itself give the appellant, a minor at the time, a political profile. The

Judge was also entitled to find that the appellant does not have an individual profile and that it was his father's political involvement which gave the appellant's father a political profile. The appellant has never been targeted for his own activities in Afghanistan and given he was only 14 of the time, he was not involved in any political activities. Therefore the Judge, on the evidence before him was entitled to find that the appellant did not have a political profile. Therefore the Judge was entitled not to accept Dr Guistozzi's conclusion that the appellant was at risk because he had a political profile. He did not.

24. The evidence was that the Taliban went to abduct the appellant at his school as revenge to the appellant's father and they picked up the wrong child because obviously they did not know what the appellant looked like. This demonstrated to the Judge that the Taliban did not recognise the appellant when he was 14 years of age and they will hardly recognise him now that he is an adult.

25. The Judge was entitled to find that the appellant would not be at risk in Kabul from the Taliban in any manner whatsoever, as he reasonably found the Taliban would use their resources for high-level government officials. The appellant's father is dead and therefore any interest they had in the appellant's father will not be transferred to his son who was minor at the time. This is a sustainable finding on the evidence, the country guidance case and background evidence which the Judge took into account.

26. It was also argued that the Judge did not find whether there was a risk to the appellant in his home area. The very fact that the Judge said that the appellant could relocate to Kabul as an alternative. I find no error of law in the Judge's reasoning about assessing the risk to the appellant in Kabul and not his home area.

27. I accept the submissions that more than the mere passage of time is required to show that the appellant is no longer at risk. However the Judge found that in the appellant's case and circumstances, the passage of time the risk to the appellant has ceased to exist. The Judge noted that the appellant would be returning to Afghanistan as an adult. These are sustainable findings by the Judge on the evidence. I find the findings are not perverse or irrational.

28. I do not accept Mr Furner's submissions that the Judge was not entitled to take into account case law which was not cited to him and this constituted "further research". I do not accept this argument because judges are entitled to take into account relevant case law in reaching their decisions. The Judge was entitled to take into account the legal principles in case law as guidance which was relevant to the appellant's appeal. There is no error of law.

29. As to the respondent's failure to trace the appellant's family, it was accepted that this ground is no longer sustainable in light of the Court of Appeal's decision. I will therefore say no more about it. I also find there has been no procedural irregularity or consideration of irrelevant matters.

30. It is argued that there are errors in the Judge's Article 8 assessment. It was argued that the Judge has failed to have regard to his own findings that there would be no

obstacles on his returning to Afghanistan and had ignored that the appellant suffered serious past persecution in Afghanistan and has effectively lost his entire biological family at the age of 14. The Judge failed to take into account that the appellant would be losing his second family in the space of five years and would return to a country where he had no surviving relatives.

31. Reading the determination, it is evident that the Judge took into account all the circumstances of the appellant which included that the appellant was not targeted in his individual capacity and would not be at risk. The Judge sustainably found on the evidence that the appellant could relocate to Kabul and that it would not be unduly harsh for him to do so. The Judge's findings are not perverse or irrational and he has made proper and reasoned findings on core issues. The grounds of appeal are no more than a quarrel with the Judges findings. In light of the country guidance case of objective evidence, no other differently constituted Tribunal would come to a different conclusion.

32. In respect of Article 8 of the European Convention on Human Rights it is argued on behalf of the appellant that the Judge did not take into account the significance of the respondent's failure to trace the appellant's parents and the respondent's long delay of some two years in determining the appellant's further leave application. This is not a material error of law because a delay of two years cannot be set that immigration control has broken down. The appellant had leave to remain in this country until 18 in any event and therefore no prejudice was disclosed. The Judge took into account that the respondent had failed to trace but this in itself does not show a material error of law such as the decision should be set aside. The Judge took into account all the relevant factors and found that the respondent's decision did not breach the appellant's Article 8 rights and this was a sustainable finding.

33. On a careful and detailed examination of the determination and the evidence, I find that the judge has not made a material error of law and his determination stands.

Appeal dismissed

Signed by
Deputy Judge of the upper Tribunal
Mrs S Chana

23rd day of November 2015