Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08854/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th October 2015	**On 23rd November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

NASRATULLAH POPALZAI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Reza, Sultan Lloyd Solicitors
For the Claimant: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Pooler dismissing the Appellant's appeal against the Respondent's decision to refuse him further leave to remain and removal directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant appealed against that decision and was granted permission to appeal by Upper Tribunal Judge Lindsley. The grounds upon which permission was granted may be summarised as follows:

(i) It is arguable that the approach to the evidence concerning the Appellant's conversion to Christianity is unlawful or applies the wrong standard of proof, and that no weight has been given to the Appellant's own testimony despite his being found a credible witness generally;

(ii) It is arguable that there may be a risk in the Appellant's home area; and

(iii) It is arguable that there is an error in relation to Article 8.

3. Whilst permission was granted on the all grounds, it is clear that Judge Lindsley despite granting permission was less impressed with the second and third points above.

4. I was provided with a Rule 24 response from the Respondent and a Skeleton Argument from the Appellant's counsel (whom was unable to attend), both of which documents I took into full consideration before reaching my decision.

Error of Law

5. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision in relation to the Appellant's conversion to Christianity and the risk on return in Ourzgan, such that it should be set aside. I do not find in the Appellant's favour on the remaining ground. My reasons for so finding are as follows.

6. In relation to the first ground, it is correct that the judge found the Appellant consistent in his evidence and rejected his conversion to Christianity solely due to an absence of supporting oral testimony from a Minister of Religion regarding his conversion. This finding however ignores the fact of evidence being given by the Appellant's foster carer, the Appellant himself and documentary evidence from a Pastor, all of which went to the fact of conversion. As Mr Whitwell rightly summarised, this is the Appellant's strongest ground of appeal. I find that the judge's consideration of this crucial issue is cursory and lacks scrutiny of the other evidence before the judge going to conversion, which omission is fatal given that if such conversion is made out, then on return to Afghanistan a Christian convert would need to hide their true faith and would be at real risk of persecution, pursuant to *NM (Christian converts) Afghanistan CG* [2009] UKAIT 00045 at [66].

7. Whilst the letter from the Pastor (at page 11 of the Appellant's Bundle) simply states that the Appellant attends church, and did not state the extent of the Appellant's journey to Christianity, I noted the attendance at the Upper Tribunal of the Pastor whom I was told would attend to give evidence in relation to this issue to assist the Upper Tribunal in its fact-finding, were an error of law to be found in the judge's analysis on this subject.

8. I find that the judge committed an error in law in assessing the Appellant's alleged conversion to Christianity such that this discrete element of the determination should be set aside.

9. In relation to the return to Ourzgan (or Uruzgan as spelt in the Appellant's Skeleton Argument), the Appellant is correct to highlight that the judge noted that the country evidence confirms that there was forced recruitment in that area historically (and the other subjective findings of fact found in the Appellant's favour at paragraph 24). The Appellant contends that pursuant to [34] of *HK & Ors (minors, indiscriminate violence, forced recruitment by Taliban, contact with family members) Afghanistan CG* [2010] UKUT 378 (IAC), forced recruitment cannot be ruled out and the level of violence in the Appellant's home area is a 'proxy measure of risk of forcible recruitment'. However, Mr Whitwell contends that *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 163 (IAC) is still extant Country Guidance and as and until there is substantial evidence that changes that status quo, it remains good law.

10. The judge is criticised by the Appellant for failing to take into account two pages of the Appellant's 500-page bundle. The document in question is the *UNHCR Eligibility Guidelines for assessing the International Protection needs of Asylum-seekers from Afghanistan (August 2013)* and the pages in question were pages 248 and 259 (section 3). This criticism fails however to mention that when confronted with the sheer size of the bundle, the judge asked the Appellant's representative to draw the judge's attention to evidence on which the Appellant relied. A perusal of paragraphs 30-32 mentions that exchange and demonstrates incontrovertibly that the representative failed to refer the judge to the relevant UNHCR Eligibility Guidelines that are said to be so important today. It also became apparent that no Skeleton Argument was served on the Appellant's behalf referring to the relevant pages of the bundle either as would normally be expected in an asylum appeal. Therefore, Mr Whitwell is right to submit that it is inappropriate for the Appellant to criticise the judge for not noting evidence which was never drawn to his attention when the judge explicitly asked that this be done and expressed that he could not wholly familiarise himself with all 500 pages.

11. I found this issue a particularly troubling one. Had the appeal not concerned international protection, in circumstances where a representative has failed to draw the judge's attention to key documentation in a 500-page bundle despite being asked to do so, I would not have been prepared to entertain the Appellant's complaint. However given the context of irreversible harm that may occur should that assessment not be correctly discharged and given the seriousness of events that the judge already accepted befell the Appellant, and given that he is not to blame for any flaws in the presentation of his appeal before the First-tier Tribunal, I am *just* prepared to find that the failure to consider the UNHCR Eligibility Guidelines, although entirely inadvertent, do result in an error such that the findings in relation to this discrete issue should be set aside. However, I would remind the Appellant's

representatives of the second headnote[1] in *HK & Ors*, which may prove difficult to overcome if the Appellant only seeks to rely upon two mere references to the UNHCR Eligibility Guidelines suggesting that forced recruitment continues in Ourzgan in general terms.

12. Turning to the final issue of tracing, I accept Mr Whitwell's submission that the Appellant said he left his mother in a particular village and that there is no basis to conclude that she would not still be there. As Mr Reza rightly accepted, in light of *TN, MA & AA v Secretary of State for the Home Department* [2015] UKSC 40, the argument concerning alleged failures in tracing is unlikely to succeed and indeed does not succeed. There was nothing said to me that could cause me to depart from that authority which I am bound by.

13. In the light of the above findings, I set aside the decision and findings in relation to the issues of the Appellant's conversion to Christianity and the risk of forced recruitment. The findings concerning Article 8 shall stand.

Decision

14. The appeal to the Upper Tribunal is allowed.

15. The decision of the First-tier Tribunal is set aside to the extent indicated.

16. The appeal is remitted to the First-tier Tribunal, to be heard by a differently constituted bench.

Anonymity

17. The First-tier Tribunal did not make an anonymity order and I was not asked to make one and do not see reason to do so at present.

Signed Date

Deputy Upper Tribunal Judge Saini

[1] *While forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility*.