IAC-FH-NL-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: AA/11660/2014
AA/11657/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 February 2016** | **On 15 March 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**ABDUL HOSSAIN NOORY**
**MASOOMA NOORY**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr J Harding, Counsel instructed by Seelhoff Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Roopnarine-Davies dated 27 August 2015 following a hearing at Taylor House on 20 July 2015. In her decision the judge dismissed appeals brought by the Appellants against the Respondent's decisions of 10 December 2014 refusing their applications for asylum and humanitarian protection, and making decisions to remove them from the United

Kingdom. The judge also held that the Appellants' removal to Afghanistan would not be unlawful under Article 8 ECHR or the Immigration Rules.

2. The Appellants are father and adult daughter respectively. The first Appellant's wife (the second Appellant's mother) is a dependent on the first Appellant's appeal. The background to this matter is that the Appellants arrived in the United Kingdom in March 2011 having previously applied for entry clearance in 2009 to visit AMN, the son of the first Appellant and his wife (and hence the second Appellant's brother). AMN resides in the UK and is a British national. The Appellants' applications were refused but they succeeded in obtaining entry clearance on appeal. It is to be noted that although the Appellants are nationals of Afghanistan they have spent over 30 years outside of Afghanistan, living in Iran, where in fact the second Appellant was born. They do not possess Iranian nationality.

3. After their arrival in the United Kingdom the Appellants applied for indefinite leave to remain as dependants of AMN. That application was refused and an appeal was pursued. That resulted in a decision of the First-tier Tribunal promulgated on 2 February 2012 dismissing their appeal. No protection claim was advanced at that stage before the Respondent or the Tribunal; rather the appeal was pursued on Article 8 grounds. Upon that appeal being dismissed, the Appellants pursued an appeal to the Upper Tribunal and ultimately to the Court of Appeal in AN (Afghanistan) & Ors v SSHD [2013] EWCA Civ 1189 (11 October 2013), in which the Court of Appeal held that the First tier and Upper Tribunals had not erred in law in dismissing the Appellants' appeals.

4. Further representations were made including asylum, humanitarian protection, and human rights grounds, resulting in the present decisions of 10 December 2014. On appeal to the First tier Tribunal on 20 July 2015, the Appellants did not pursue the asylum ground (decision, para [9]), but argued that they were entitled to humanitarian protection, immigration rule para 276ADE(1), and that their removal would be unlawful under article 8 ECHR.

5. The judge set out in her decision a number of issues which caused her concern as regards the credibility of the Appellants and their claims to lack family support in Afghanistan. She held at paragraph 20 as follows:

> "20. Having considered the evidence as a whole including the oral evidence of the Appellants and their witnesses I did not find them to be open and straightforward in material aspects e.g. their continuing connections to and level of contact with Afghanistan. The impression as a whole is of a very close family. Their evidence was noticeably reticent in reference to the first Appellant's other son whom it was claimed lived in Iran. I do not accept that they are not aware of his whereabouts. Although the psychologist's report was not relied on as a basis for claiming

that the first Appellant's health is a factor in assessing removal, it was there stated that he was worried about his son because of the kidnap of Shia Afghanis. This suggested that his son may live in Afghanistan though I do not proceed on that basis.

21. I do not accept that the Appellants last visited Afghanistan in 2004 to regularise their residency status in Iran. The findings by the FtT and the CA were that they visited in 2010. In 2004 their passports were issued by the Afghan Embassy in Tehran. Masooma has visited the country approximately 2-3 times in her life, possibly more. Masooma and the witnesses were not candid. Her father lived in Afghanistan for most of his life. As at 2013 he and his wife each had a brother there. There was not evidence beyond assertion that his brother has since died or that his cousin who lived in a village in Afghanistan had moved to Russia. The oral evidence of the first Appellant was at odds with that of Masooma and her brother regarding their mother's relatives in Kabul. I preferred the evidence of the last 2 that she has 2 brothers in Kabul. One has 7 children, the other 2 children. Their claim that they were not aware of their cousins' circumstances was not credible. Eventually it emerged that one of their uncles has a car repair business in which the sons are involved. There was no evidence that they had suffered any harm in Kabul as a result of the security situation or otherwise."

6. There was also a reference at paragraph 23 that the judge found the witnesses coy about their visits to Afghanistan and sought to underplay their connections.

7. In summary, the judge held that the Appellants had not shown that they were at individualised risk of harm in accordance with Article 15C of the Qualification Directive and were thus not entitled to humanitarian protection. Their application under the Refugee Convention was not pursued. The judge also held that in relation to Immigration Rules 276ADE none of the Appellants succeeded because of the judge's assessment of the likely availability of support from other family members in Afghanistan.

8. Grounds of appeal were filed against that decision, initially resulting in a refusal of permission by the First-tier, but upon renewal to the Upper Tribunal permission was granted. Those grounds are lengthy, and argue, in summary, that the judge erred in law in:

(i) wrongly recording the evidence of the witnesses before her, in relation to at least 8 different elements of the Appellants' evidence (set out in the grounds at, paras 9-23), resulting in her adverse credibility finding being unsound;

(ii) misapprehending the scope and relevance of a report from June 2015 from the International Crisis Group, when assessing the

security situation in Afghanistan for the purposes of her assessment of the Appellants' claim for humanitarian protection;

(iii) making irrational findings at [26] as to whether there were very significant obstacles to the second Appellant's integration into Afghanistan (she never having lived there), as per 276ADE(1)(vi);

(iv) misdirecting herself in law in her assessment of whether there were very significant obstacles to the Appellants' integration into Afghanistan, as per 276ADE(1)(vi); by directing herself at [25] that the security situation in Afghanistan was irrelevant to integration;

(v) failing at [25] to apply Devaseelan in respect of an earlier finding by the Tribunal in 2012 that the family would 'face real difficulty upon moving to Afghanistan', in that the judge held that such a finding was not sufficient to establish that there were very significant obstacles to integration into Afghanistan under para 276ADE(1)(vi);

(vi) failing, when assessing the proportionality of the proposed removal of the second Appellant, to take into account mandatory considerations under s.117B of her ability to speak English and her financial independence, or that her British husband could not reasonably be required to live in Afghanistan, in the light of F&CO travel advice which recommends against all but essential travel to Afghanistan.

9. Permission to appeal was granted generally by UTJ Karama on 16 October 2015, noting that as the Appellant raised an issue regarding the accuracy of the Judge's note of evidence, that the drafter of the grounds of appeal should file a witness statement, and the Appellants should engage separate Counsel for the hearing before the upper Tribunal.

10. Before me, such arrangements are in place; Mr Seelhoff, of Seelhoff Solicitors, has prepared a witness statement setting out the allegations made in the grounds of appeal, supported by his note of evidence before the First tier Judge. Mr Harding of Counsel appeared for the Appellants, with Mr Seelhoff being available for cross examination by the Respondent if necessary. At the appeal before me, I made available to the parties a copy of the note of evidence taken by the judge.

11. Mr Harding proceeded to address me on the Appellants' grounds of appeal. The first issue is the suggestion that the judge incorrectly recorded the witnesses' evidence in a number of respects. Firstly, at [20] the judge suggested that the Appellants were reticent in reference to the first Appellant's older son. The Appellants argue that none of the witnesses were asked any questions about the first Appellant's older son, thus their evidence could not properly be described as being 'reticent', nor could

they properly be criticised for failing to give evidence about him. Upon consideration of both Mr Seelhoff's statement and his exhibited handwritten note of evidence, and the note of evidence taken by the judge, it seems correct that questions were not asked about the first Appellant's older son, or his whereabouts. I agree with the Appellants' submission that it may not be appropriate for adverse inferences to be drawn from a witness's perceived unwillingness to give evidence on a particular topic, when the witness has not been asked questions about that topic.

12. Secondly, whereas at [21] the judge did not accept that the Appellants last visited Afghanistan in 2004 to regularise their residency in Iran, the grounds assert that neither of the Appellants had in fact said that they had last gone to Afghanistan in 2004. Rather, the first Appellant had said: "I cannot recall precisely", but thought that it was "almost seven years ago" (which would therefore have been in or around 2008) and the evidence of the second Appellant, Masooma, was that she thought it was "when I was 11", being therefore in or around 2006 or 2007.

13. Again, upon consideration the notes of evidence taken by Mr Seelhoff and the judge, it seems correct that none of the Appellants had asserted before the judge that they had last gone to Afghanistan in 2004.

14. When considering what ties the Appellants have to Afghanistan, their actual evidence, which was that they were last there in 2008 (or potentially 2010 according to evidence recorded in the earlier proceedings) would result in them having last visited their country of origin more recently than the judge had thought, and therefore potentially undermining their assertion to have lost ties with Afghanistan. However, the point the Appellants raise is that there can be little confidence in the judge's credibility assessment in this regard, and in other regards, when it becomes apparent that the evidence of the witnesses had been recorded incorrectly. I tend to agree with that proposition.

15. Further, at paragraph 21 the judge had asserted that Masooma and the witnesses were not candid, but there is no example of their lack of candour being set out within the judge's paragraph. I find that an allegation of insincerity or dishonesty needs to be supported by some illustration of the inconsistent, implausible or otherwise untruthful element within a witness's evidence, in order to substantiate such an allegation. I cannot find any such substantiation within that paragraph of the judge's decision.

16. At this juncture, following partial submissions made by Mr Harding, Mr Nath wished to address me having considered the position on behalf of the Respondent and having heard the submissions thus far by Mr Harding. He informed me that upon his consideration of the matter he had formed the view that the Appellant's first ground was made out in the following respect; that there did appear to be instances within the judge's record of

evidence as set out in the promulgated decision where the evidence appeared to differ from the judge's own record, and the record taken by Mr Seelhoff, which gave some cause for concern that the judge may have proceeded to assess the factual situation for this family upon potential return to Afghanistan on a misinformed basis, and that the credibility of the witnesses may have been impugned on an incorrect basis also. So, the Respondent accepted that the first of the Appellant's grounds was made out. I found that it was not then necessary to consider the other allegations within Ground 1 as to other elements of evidence said not to have been set out correctly in the decision.

17. I then raised with the parties the fourth ground relied upon by the Appellant, which is that in finding that there would be no obstacles to the Appellants' integration into Afghanistan that due to her social, cultural and family ties being not other than Afghani, it appeared at paragraph 25 of the judge's decision that she had misdirected herself in law. The judge held as follows on her assessment of the first Appellant's ability to integrate into Afghanistan:

> "25. The first Appellant is 73 years old. He has lived for over 30 years in Kabul, 19 ***(sic – this should be 29)*** years in Iran and 4 years in the UK. He and his wife have not suffered harm or persecution in Afghanistan or Kabul. He speaks Dari and Farsi. He will return with his wife who is 10 years younger than he and who has no health problems. They have close and extended family members in Kabul with whom they are in contact. They have sufficient means to live in Kabul. Their family in the UK can visit them. The first Appellant is old but not disabled. It is not claimed that their health is an impediment to relocation. Considering the evidence as a whole I find that there are not very significant obstacles (including social, cultural or family) to his integration (not safety) into Afghanistan within para 276ADE(vi) private life of the Rules. I do not accept that the security situation is relevant to integration."

18. Before the judge, the Appellants had raised as a discrete argument that they faced a serious and individual threat to their lives or person by reason of indiscriminate violence in situations of international or internal armed conflict, contrary to art 15(c) of the Qualification Directive. The judge held at [15-16] that was no sufficient evidential basis for her to depart from guidance in AK (Article 15(c)) Afghanistan CG [2012] 00163 (IAC) that there was no such risk.

19. Even if that were a sustainable finding (as to which, see para 21 below), I find unsustainable the judge's proposition at [25] that the security situation in Afghanistan is irrelevant to the assessment of whether there may be very significant obstacles to the Appellants' integration into Afghanistan as per para 276ADE(1)(vi). Security concerns, even if falling short of establishing a ground for humanitarian protection, must logically

in my view be relevant to any person's ability to integrate into a country. It would clearly be easier for a person to integrate into a country in circumstances of peace and the respect for the rule of law, on the one hand, or in circumstances of significant armed conflict between government forces and Anti- Government Elements (AGE's), and indiscriminate attacks on the civilian population, on the other, as is the case in Afghanistan, on any assessment. I find that the judge misdirected herself in law in finding that such conflict was irrelevant to the assessment of integration under 276ADE. Quite how the security situation in Afghanistan would affect the Appellants' integration into Afghanistan is therefore a matter which needs to be decided, but taking that security situation into account, rather than ignoring it, and taking into account that the first Appellant spent 29 (not 19) years lived outside Afghanistan before coming to the UK.

20. I have therefore found two material errors of law; firstly the judge's assessment as to the factual situation which exists for members of this family upon return to Afghanistan, and also whether the security situation is relevant for the purposes of the assessment of their integration into that country.

21. As a result of those findings it is therefore unknown what the circumstances may be for this family upon return. Consequently I find that the judge's finding on humanitarian protection is also infected by error. Whether someone is at risk from serious and individual threat to their lives or person by reason of indiscriminate violence will necessarily depend on what level of security they will benefit from, and what assistance and accommodation may be available to them on return. I therefore find that there are sufficient errors of law in the judge's decision such that its overall conclusions cannot be relied upon and I set it aside. It has not been necessary for me to rule on the Appellants' grounds (ii), (iii), (vi), and (vi), therefore, although I do not think that (vi) has merit.

22. The consequence of this is that all findings of fact need to be re-made. I find, and the parties agree, that the appropriate place for that to take place is in the First-tier Tribunal and that the Appellants' appeal should be remitted to that Tribunal. I make no specific directions as to how that appeal proceeds. I leave that to members of the First-tier Tribunal, save that all relevant findings of fact will need to be re-made. I therefore allow the Appellants' appeal to the extent that it is remitted to the First-tier Tribunal.

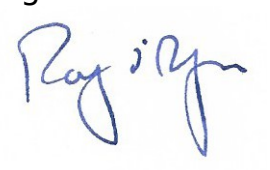
**Notice of Decision**

The making of the decision by the First tier Tribunal involved the making of material errors of law.

I set aside the decision of the First tier Tribunal.

I remit the appeal to the First tier under powers under s.12(2)(b)(i) Tribunals, Courts and Enforcement Act 2007.

Signed Date: 4.3.16



Deputy Upper Tribunal Judge O'Ryan