



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA060622016

THE IMMIGRATION ACTS

Heard at Bradford
On 30 May 2017

Decision & Reasons Promulgated
On 03 July 2017

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

H Y
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Cole

For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, H Y, was born in 1991 and is a male citizen of Afghanistan. He appealed against a decision of the respondent dated 27 May 2016 to refuse his

protection claim. The First-tier Tribunal (Judge Kelly), in a decision promulgated on 8 December 2016, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Judge Kelly summarised the appellant's claim as follows:

“5. The appellant's case, as he presented it at the hearing of his appeal, may conveniently be summarised as follows.

6. Prior to his departure for the United Kingdom in May 2014, the Chief of Staff of the TCC (Mukhtar Ullah) had promised the appellant that he would be given a key position within government upon his return to Afghanistan. Mukhtar Ullah reiterated this during the course of a telephone conversation whilst he was visiting London with Dr Ashraf Ghani, who was by now the President of Afghanistan. The appellant had been too busy to meet with them at the time due to his study commitments in Chester.

7. Upon returning to Afghanistan in September 2016, therefore, the appellant met with Mukhtar Ullah who was now the Chief of Staff to the President. They discussed the terms and conditions of a role within government (that was similar to that which he had formerly held with the TCC) and they agreed that he would commence his new employment upon return from his graduation ceremony in Chester (UK) which was due to take place on 5 November 2015.

8. On the 26 October 2015, the appellant attended his local mosque in Afghanistan with his uncle, Mr M N. Following noon prayers, his uncle informed him that a group of local insurgents were coming for him. Rather than returning to his father's house, therefore, the appellant went with his wife and children to the home of his uncle in Shahak in order to hide. Shortly afterwards, a group of insurgents attended and surrounded his uncle's house. His uncle and a group of local Elders acted as intermediaries. The insurgents said they had come for the appellant because they needed him to work for them. They were told they could not enter the house as there were women present. The appellant's uncle sought to persuade the insurgents that the appellant was not going to work for the government and was thus of no value to them. The insurgents nevertheless insisted that the appellant work for them due to his links to high-ranking government politicians and knowledge of sensitive information. Ultimately, agreement was reached that the insurgents would lift their siege in return for a promise that the appellant would be delivered to them at a later date.

9. The appellant thereafter returned to the home of his father. He remained undetected because he was wearing a burka. Upon being told what had occurred, his father advised him that he had no option but to leave the country. That advice was reinforced when, having explained to Mukhtar Ullah what had occurred earlier that day, he was informed that the government would be unable to provide him with protection outside work. He therefore flew out from Afghanistan on the following day, landing in the UK on the 28th October 2015.

10. It did not occur to the appellant to claim asylum upon arrival at the airport. He did however make a number of enquiries of various solicitors. He eventually found a solicitor in Manchester who put him in touch with the Home Office. This led to the making of an appointment in order to claim asylum on the 3rd December 2015.

11. The appellant has since learnt from his uncle (who remains in Afghanistan) that the insurgents attended at the home of his father a few days after his departure and fired shots. As a result, his parents, his sister, and his brother, have moved to Iran.

12. On return, he fears "persecution from insurgents ... because [he] couldn't survive their torture or I couldn't work them so I couldn't survive their torture" [reply to question 110 of AIR]."

3. At [37], Judge Kelly found that the appellant had been truthful in relation to the entirety of his account. At [38], he concluded,

"38. At first blush, the respondent's argument concerning sufficiency of protection is an attractive one. If the President of Afghanistan is unable to provide the appellant with adequate protection then nobody can. However, the appellant does not seek to argue that he would be unsafe during office hours. His argument is that that there would be insufficient protection for him at other times, such as when he was at home or whilst travelling to and from work. I find that argument persuasive given that it was confirmed to the appellant that the security arrangements for government staff would not extend beyond the office door. So far as other law enforcement agencies (such as the police) are concerned, the Mujahideen have already demonstrated their ability to act with impunity within the appellant's home area. I am therefore satisfied that the appellant would to that extent at risk on return."

4. Judge Kelly rejected the appellant's claim that he would be at risk elsewhere in Afghanistan:

"39. I am not however satisfied that this risk extends to other areas of Afghanistan. The appellant's argument to the contrary can be found in paragraph 9 of his witness statement:

"It is not possible for me to return to Afghanistan because I have travelled 114 times to the different provinces. There are 32 different provinces so I have visited them a lot. I would meet with the people, meet with the chief of police, local leaders, ministers etc and so they all know who I am. The insurgents could have been there. They are often just local people. I was also in touch with the local people to help to solve their problems when they contacted the President's office so they know who I am. I cannot go back to Kabul as that was where I was living before and it other provinces are a lot less secure than Kabul so I have nowhere safe to go."

40. I reject this argument for the following reasons. Firstly, I have noted the speculation that is inherent in the phrase "insurgents could have been there". Secondly, whilst I accept that the appellant has travelled extensively throughout Afghanistan this would in turn necessarily have limited the time that he was able to spend in any one place and thus become a familiar face. Thirdly, and in any event, the prospect that local people would remember the appellant following brief visits that were made upwards of 2 ½ years ago seem to me to be so remote that it can safely be discounted. Moreover, my attention has not been directed to any evidence to suggest that there is a network of communication that would enable insurgents in Kabul to identify the fact that the appellant was residing in another area of Afghanistan."

5. Judge Kelly reached his own conclusion regarding the availability of internal flight at [41]:

“41. I therefore turn to consider whether the appellant could reasonably be expected to reside in another area of Afghanistan. I accept that the arrival of a highly educated and to some extent westernised man in a rural community would raise questions about who he was. I also accept that it would be difficult for a man of his background to gain employment in such an area. On the other hand, it appears to me that he would have little difficulty in finding suitable employment in an urban area such as Jalalabad. He would not attract the level of attention in a populous city that might occur in a rural village. He would not be required to be discreet about his political opinions. There would however be no reason for the casual observer to suspect that he had ever worked for central government with its associated risk of coming to the adverse attention of members of the local Mujahidin. I therefore find that the appellant has failed to show that he would be unsafe upon relocation to another city in Afghanistan, or that it would be unreasonable to expect him to do so.”

6. Granting permission, Judge Kopieczek wrote:

“I consider it arguable that the First-tier Tribunal Judge erred in law in his consideration of the issue of internal relocation in the light of the appellant’s background and the findings of fact in his favour. Whilst not advanced as an argument in the grounds, there may be something to be said for the proposition that whilst the First-tier Tribunal Judge at [41] considered the appellant would not be required to be discreet about his political opinions, the same arguably could not be said for his background of work for the government.”

7. Mr Cole, for the appellant, sought to rely on *MSM (Somalia)* [2016] EWCA Civ 715, in particular at [46 – 49]:

“There are three difficulties with this submission. First, Lord Dyson only stated that there "may be scope" (emphasis added) for the application of the distinction and only regarded it as an alternative way of looking at the position. Secondly, his approach was not adopted by the other members of the Supreme Court. Thirdly, in *RT (Zimbabwe)*'s case, Lord Dyson stated (at [50]) that the parts of his judgment on which Ms Rhee relied said no more than "a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution". As Ms Demetriou observed, that is essentially a restatement of Article 9(1)(a) of the Directive, which is concerned with whether the persecution is sufficiently serious to be a severe violation of basic human rights. In this case, the Upper Tribunal's finding is that MSM faces the risk of death or violence if he returns to Somalia as a journalist, and that clearly falls within the meaning of persecution under Article 9 of the Directive.

I have acknowledged that the cases I have referred to so far concerned actual rather than imputed protected characteristics. The decision of the Federal Court of Australia in *Minister for Immigration and Border Protection v Szscs* [2013] FCAFC 115 does not. It is, in my judgment, on all fours with the present case. The case concerned a citizen of Afghanistan who applied for asylum in Australia on the ground that the Taliban had imputed pro-government or pro-western opinions to him because he had worked as a lorry driver transporting construction materials in Afghanistan. He had previously

worked as a jeweller. In the tribunal, it was successfully argued that because the imputation of political opinion arose solely because of the Taliban's perception of the applicant's truck driving activities, he could avoid persecution if he were to change his occupation and work as a jeweller in Kabul. An appeal by the applicant to the Federal Court of Australia was allowed.

The majority of the Federal Court decided (see [62] - [66]) that the tribunal had erred in embarking on a chain of reasoning that the applicant for refugee status could avoid persecution if he were to change his occupation. It stated (at [63]) that the tribunal had erred in looking at what the individual "could do rather than what he would do if returned" to Afghanistan. The High Court of Australia dismissed the Minister's appeal, but did so on the ground that the tribunal had failed to address whether the applicant could reasonably be expected to remain and work as a truck driver in Kabul. That is an internal relocation analysis. Ms Rhee invited us to follow the dissenting judgment of Flick J in the Federal Court. In terms of precedent, this decision provides no assistance to her case and directly supports those of the respondent and the position taken by the UNHCR. The argument accepted by the majority of the Federal Court is also essentially the argument which, for the reasons I have given, I would have been inclined to accept in the present case had it been necessary to decide the wider question.

For these reasons, I would dismiss this appeal."

8. Mr Cole also helpfully supplied me with the case of *Minister for Immigration and Border Protection v SZSCA* [2013] FCAFC 155, the Federal Court of Australia case to which the Court of Appeal refer in *MSM*. The Federal Court, in turn, approved an Australian High Court decision (s 395) including the statement in that judgment that, "the [Refugee] Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors."
9. I am reminded that each case should be determined according to its own facts. In the instant appeal, the facts are very clearly set out in Judge Kelly's decision in the passages which I have quoted above. I accept that it is often unhelpful to compare the facts of a case with those in a case before the Higher Courts; one should, instead, seek to derive from the judgments of Higher Courts the principles of law which it is necessary to apply rather than to embark upon a detailed comparison of factual matrices. However, in this case, I find that it is possible to distinguish the facts from those which applied in *MSM* and also in the Australian case referred to by the Court of Appeal in *MSM* at [47]. In those cases, the issue of internal flight was examined in the context of an appellant's profession or usual occupation, in the case of the Australian case, that of lorry driver. Lorry drivers operate throughout Afghanistan. Further, as the Court of Appeal noted, in the Australian case "the Taliban have imputed pro-government or pro-western opinions to [the appellant] because he had worked as a lorry driver transporting construction materials in Afghanistan." In the present case, the imputation of political opinions to the appellant because he had been offered a job at a high level in the Central Government of Afghanistan was not the issue. Rather, the appellant feared local insurgents who had become aware that

he had been offered the job in government not because of the imputed political opinions to him to which they objected on account of his work but because they wished to exploit his employment position for their own ends no doubt by manipulating him and obtaining information from him which he might, in turn, acquire in the course of his duties. It is clear that the appellant believed that he would be ill-treated by those specific insurgents if he chose not to assist them. There is nothing to suggest that if he was working in another government job the appellant would meet the same problems; for whatever reason, the particular insurgents wished to exploit his occupation of the particular role which he had been offered and which he would take up upon his return from a graduation ceremony in the United Kingdom. In short, the fear of persecution arose (i) from the annoyance of the insurgents who had been thwarted by the fact that the appellant had not taken up the job but fled to the United Kingdom and; (ii) the fact that if he had stayed and taken up the job the Afghan authorities were unwilling or unable to offer the appellant protection. I accept, referring to the passage which I have quoted above [8] that the appellant's potential persecutors would "win" if he was compelled to work for them and thereby be bent to their wish if he returned to Kabul. However, Mr Cole's submission that the appellant would, in effect, be excluded from taking *any* high level government job (in Jalalabad or a large city other than Kabul) is simply not borne out by the facts in this case. As I have said, there is no evidence that these particular insurgents or any other group of insurgents elsewhere in Afghanistan would be interested if the appellant were to occupy some other high level government job and, secondly, there is no evidence at all that the job referred to by the appellant in which he hoped to take up in Kabul would be available to him now some years after it had been offered and that it would be available outside the capital of Afghanistan. In this way, the facts of this case are wholly different from those in the Australian decision because, as I have noted, a lorry driver (in the same way as a doctor or a teacher) is a job title or profession which exists throughout Afghanistan. Significantly, Mr Cole did not argue that internal flight was not appropriate in this case simply because the appellant would be unable to take up the job offered to him anywhere else other than Kabul. If the appellant sought and obtained a high level government job (obviously, not the same job as that which he had been offered previously which would only be available in Kabul) in, say, Jalalabad there is no evidence that any group of insurgents would necessarily show an interest in him because of his work or that they would impute political opinions to him on account of such work. The fear which he may have felt in Kabul related to a particular job and to a particular group of insurgents; neither the job nor the individuals involved will be the same if he seeks employment in a large city such as Jalalabad.

10. In the light of these comments, I conclude that Judge Kelly's findings at [41] were indeed available to him on the evidence. Judge Kelly refers to "suitable employment" in a city such as Jalalabad. I take it that he intends to mean government work as well as other employment which might suit the appellant given his educational background. Indeed, I would go further than Judge Kelly in finding that the appellant could work for the Central Government in Jalalabad and do so without risk of serious harm although I do agree with Judge Kelly's observation that "no

casual observer [would] suspect that [the appellant] had ever worked for the Central Government ...”

11. For the reasons I have given, this appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 23 June 2017

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Upper Tribunal Judge Clive Lane

Date: 23 June 2017