



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/01256/2017

THE IMMIGRATION ACTS

**Heard at Bradford
On 6 August 2018**

**Decision & Reasons Promulgated
On 22 August 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Mills (Senior Home Office Presenting Officer)

For the Respondent: Mr H Samra (Solicitor)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (the tribunal) which it made on 15 August 2017 after a hearing of 28 July 2017 and which was sent to the parties on 18 August 2017. In making that decision the tribunal allowed the appeal of the claimant from a decision of the Secretary of State of 24 January 2017 to refuse to grant him international protection.

2. I have granted the claimant anonymity. Such was granted by the First-tier Tribunal and nothing was said before me by way of any attempt for me to do otherwise. In those circumstances I have decided it is appropriate to maintain the status quo.

3. By way of background, the claimant was born on 1 January 1995 and is a national of Afghanistan. He says he has a brother who has been granted asylum in the UK and whom I shall refer to, without any intended disrespect and simply for the purposes of preserving anonymity, as “the brother”. The claimed family relationship between the claimant and the brother might have been the subject of some initial dispute but, as the tribunal noted, DNA evidence had proved the relationship such that it was no longer the subject of dispute.

4. Shorn of all but essential detail, the claimant’s account of the events underpinning his asylum claim may be summarised as follows: The claimant is from a village called Mosa Kala which is located in District Kabul. In 2007 there arose a family dispute regarding inherited land. There was particular enmity between the claimant’s father and the claimant’s two step-brothers. This culminated in an incident which occurred in 2007 or 2008 whereby the claimant’s father and the claimant’s elder brother (not to be confused with the person whom I have referred to as “the brother”) were killed. The remaining family members fled to Pakistan and, whilst there, a further attempt to harm them was made. The brother, however, did not stay with the rest of the family after the incident but, with the assistance of a relative, travelled to the United Kingdom assisted by an agent. He entered the United Kingdom in March 2009 and claimed asylum. His claim was successful after an appeal before Immigration Judge Kirvan as she then was. Returning to the claimant’s situation, he returned from Pakistan to Afghanistan and went to a village called Taghab where he stayed with an uncle. However, his uncle told him that members of the Taliban were seeking to recruit him. Accordingly, in 2015 and with the assistance of an agent, he too decided to flee Afghanistan. He travelled through Iran, Turkey, Greece, Italy and France before arriving in the United Kingdom on 23 December 2015 when he made his own claim. He asserted, in claiming, that if he were to be returned to Afghanistan he would be persecuted by members of the Taliban and also would be harmed or killed as a result of the family dispute concerning land in the way his father and elder brother had been.

5. The Secretary of State did not believe the claimant’s account of events. That is despite Judge Kirvan having believed the brother regarding the incident when it is said the claimant’s father and elder brother were killed. Indeed, the reasons for refusal letter in this case does not refer to the brother or Judge Kirvan’s decision at all. Be that as it may, the Secretary of State disbelieved the claimed land dispute and disbelieved the claimed attempted recruitment by the Taliban. He took the view that there were elements of inconsistency and implausibility in the account presented. He also noted that the claimant had failed to claim asylum in various other countries which he had passed through en route to the United Kingdom such that section 8 of the Asylum and Immigration (Treatment of Claimants, Etc) Act 2004 applied. The Secretary of State then made alternative findings, both of which are set out in some detail in the reasons for refusal letter, to the effect that even if the account was true there would be a sufficiency of protection for the claimant in Afghanistan and that, anyway, he would have available to him an internal flight alternative.

6. As indicated, the claimant appealed and the tribunal allowed his appeal. The tribunal produced unusually short written reasons for its decision. That is not a criticism because succinctness, of itself, should not be faulted. But it is, of course, important that all relevant matters raised by an appeal are considered and addressed. The tribunal, in fact, placed very significant weight upon Judge Kirvan’s finding with respect to the brother. Having briefly addressed the DNA evidence and having summarised the claimant’s own evidence to it and the brother’s evidence to it, the tribunal said this:

“9. In closing the Home Office simply relied on the Refusal Letter. Mr Samra [the claimant’s representative at that hearing] referred to the decision of Judge Kirvan and highlighting a number of different paragraphs noted that the accounts were the same. The appellant and his brother were from Kabul and so would be returned to the area where they had been in difficulties.

10. The appellant’s brother’s claim and the decision of Judge Kirvan are a relevant and convenient starting point for the consideration of the facts of the appellant’s case. Although I do not have the Refusal Letter from his brother’s original application it is clear from the decision of Judge Kirvan that much of his account was accepted, it was the consequences for his brother that were in issue. The judge found that there was imputed political opinion and that he had been sought out by a family member who was in Taliban. As noted above the decision was not challenged by the Secretary of State.

11. The appellant’s account is not materially different from that of his brother and he has independently shown that he and his brother are related as claimed. The inconsistent stance of the Home Office over the accounts has to be resolved in line with the findings of Judge Kirvan given that judicial consideration of evidence carries significant weight and this situation is analogous to that in Devaseelan and the guidelines from that case.

12. As the appellant and his brother have the same background and it has been found that in those circumstances the appellant’s brother is in need of international protection it has to follow that the appellant would be at risk on return to Afghanistan too. There is no sensible mechanism for distinguishing between them and I decline to do so. Accordingly, and in reliance on the findings made by Judge Kirvan, I find that the appellant would be at risk on return to Afghanistan, given that he is from the Kabul area internal relocation is not an option.”

7. On that basis the tribunal allowed the claimant’s appeal, concluding that he had made out his case to be a refugee.

8. That was not the end of the matter because permission to appeal to the Upper Tribunal was sought by the Secretary of State. The grounds, whilst I paraphrase, were to the effect that the tribunal had been required to make its own assessment as to the credibility of the claimant and had failed to do so through simply relying upon the acceptance of the brother’s claim. Further, the tribunal had erred through failing to consider whether the lapse of time since the killing of the family members (if that had occurred) might alter the position with respect to risk from what it had been when the brother’s appeal was allowed. Further still, the tribunal had erred, it was said, through failing to consider the various points made by the Secretary of State regarding the availability of both a sufficiency of protection and an internal flight alternative.

9. Permission to appeal was granted by a judge of the First-tier Tribunal. The salient part of the grant reads as follows:

“In a brief decision, the judge finds that the appellant’s brother’s success at appeal before the first-tier in 2009 is sufficient to enable the appellant to succeed. It is arguable that further analysis of the facts of the appellant’s claim is required. It is arguable that claimed changes brought by the passage of time requires consideration.”

10. Permission having been granted the matter was listed for a hearing before me so that it could be considered whether or not the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am very grateful to each representative. Mr Mills relied upon and sought to build upon the grounds of appeal referring me, in particular, to the judgment of the Court of Appeal in *AA (Somalia) and AH (Iran) v SSHD* [2007] EWCA Civ 1040. Mr Samra, offered a spirited defence of the tribunal’s decision pointing out, amongst other things, that it had correctly stated the legal test for qualification as a refugee and that the evidence in this appeal had effectively been identical to that which had been before Judge Kirvan when she considered and decided the brother’s appeal.

11. I have concluded that the tribunal's decision did involve the making of errors of law such that that decision has to be set aside. What I say below explains my thinking on the matter.

12. The tribunal indicated, at paragraph 10 of its written reasons, that it regarded the decision of Judge Kirvan as representing its starting point. Mr Mills argues, following *AA and AH*, that even that was wrong. He points me to paragraph 29 of the Judgment of Lord Justice Hooper in which, after a consideration of competing submissions as to the approach to be taken when findings have been made in respect of one claimant in one judicial decision and those findings might have relevance to the appeal of a different claimant, this was said:

“29. In my judgment it is time for the Court of Appeal to adopt the submissions made by Mr Kovats. In cases where the parties are different, the second tribunal should have regard to the factual conclusions of the first tribunal but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first tribunal, the second tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first tribunal. In my view *Ocampo* and *LD* do not stand in the way of this simple approach. Both cases make it clear the first decision is not binding and that it is the fundamental obligation of the judge independently to decide the second case on its own individual merits. All that I am doing is simplifying and clarifying the law. Simplification and clarification have the advantages of making it easier for immigration judges for whom the law is already far more complicated than it should be and of making it less likely that there will be appeals on whether the second tribunal was, or was not, bound by the decision of the first. It also has the advantage that the same rule applies whether the previous decision was in favour or against the Secretary of State.”

13. So, in my judgment, if the tribunal was simply saying that the decision of Judge Kirvan was its first port of call in reviewing the evidence before it prior to reaching its findings, then that would be uncontroversial. But it seems to me clear that the tribunal was, in fact, doing more than that. It was, in effect, deciding that the full rigour of the guidelines set out in *Devaseelan (Second Appeals-Extra-Territorial Effect) Sri-Lanka* [2002] UKIAT 00702 applied to this case despite its not being a case involving the same parties. Thus, it did not follow the approach set out in *AA and AH* and, in particular, it did not devalue the evidence and submissions as it would have done in any other case. Had it done so it might have reached a different view with respect to this claimant's credibility. It might not have done either but I certainly cannot rule out the possibility that it might have done. So, that error, whilst understandable, was material.

14. Even if the full rigour of the *Devaseelan* guidelines did apply then I would still have concluded that the tribunal erred in law. That is because the key event upon which it effectively relied for allowing the claimant's appeal had occurred in 2007 or 2008. On any view that was a good many years ago in the context of what is said to have been a family feud. Of course, feuds can last for many years. But equally there is the possibility that, over time, enmity might dissipate. Here, the tribunal did not appear to have considered that possibility. I agree with Mr Samra that the point does not appear to have been explicitly taken before the tribunal by the Home Office presenting officer who was then representing the Secretary of State. But it is, in the circumstances, an obvious point which, in my judgment, did require addressing absent any specific concession. One of the points expressly made in *Devaseelan* regarding second appeals concerning the same parties to a first appeal, was that the situation might change as a result of the effluxion of time.

15. It may be, as Mr Mills argues, that the tribunal also erred through failing to carry out, on the assumption that the claimant had told the truth, sufficient assessment concerning internal flight. I say that because whilst the tribunal said that the claimant is from Kabul and so could hardly safely take

advantage of an internal flight alternative to Kabul (though it didn't put it quite like that) the evidence was that, in fact, he is from a village in Kabul province but not from Kabul city. So, that did not obviously preclude the possibility that he might, if at risk in that village, be able to safely relocate to Kabul city. The matter had been raised in the Secretary of State's reasons for refusal letter, albeit in perhaps a slightly confused way, so it can certainly be argued that it ought to have been addressed. But, since I have already identified other errors of law, it is not necessary for me to reach a definitive view as to that. Nor, for that matter, is it necessary for me to reach a definitive view as to whether or not the tribunal might have erred through failing to consider the arguments presented in the reasons for refusal letter regarding the claimed availability of a sufficiency of protection. I can certainly see difficulties with any such argument but perhaps, since the point had been raised and since some time had been spent in the reasons for refusal letter on making the argument, the tribunal was required to say at least something, even if merely briefly, about it.

16. In the circumstances then the tribunal's decision is set aside. Indeed, I told the parties, at the hearing, that that was the course of action I was going to take. The representatives, in the face of that, expressed a preference for me remitting to the First-tier Tribunal for a complete rehearing. I have concluded that that is the appropriate course. I have, therefore, issued some brief directions which I hope will assist to some extent in the remaking process.

DIRECTIONS FOR THE REHEARING

- A. The decision of the First-tier Tribunal which it made on 15 August 2017 and which it sent to the parties on 18 August 2017 involved the making of errors of law and is set aside.
- B. The appeal shall be reheard by way of a complete rehearing with nothing preserved from the findings and conclusions reached by the previous tribunal. The rehearing shall be an oral hearing but shall not involve the First-tier Tribunal judge who decided the appeal on 15 August 2017.
- C. Matters concerning listing arrangements, time estimates, interpreter provision and the like are to be left to the First-tier Tribunal.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The case is remitted to the First-tier Tribunal for a complete rehearing.

The First-tier Tribunal granted the claimant anonymity. I continue that grant. No report of this case shall identify the claimant or any member of his family. Any breach may result in Contempt of Court proceedings.

Signed:
Upper Tribunal Judge Hemingway

Date: 13 August 2018